Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

William Timothy Fister,
parent and guardian on behalf of Mary Fister

Petitioner,

v.

Minnesota New Country School

On Petition For Writ Of Certiorari
To The 8th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

William Timothy Fister
guardian and parent on behalf of Mary Fister
pro se
314 South 3rd St.
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57 pp

When does a public school student have the right to free expression in their personal workspace at the public school?

If a public school student is expelled for materially and substantially disrupting the educational process, then does the student have a right to a trial to address the question of disruption?

If the facts are disputed can a Summary Judgement be granted to the party with the burden of proof?

Can pure speech which is not per se offensive be considered harassment?

Can evidence be controverted by a general claim of its dispute?

If a public school utilizes the services of a lawyer in a disciplinary action against a student, is it equally obliged to provide the services of a lawyer for the student against whom it takes the action?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner William Timothy Fister, on behalf of his daughter Mary Fister, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 11, 1998.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-4) is unreported. The rulings of the District Court (App. 5, 6-21, 22-3, 25, 26-8, 30) are unreported.

BASIS FOR JURISDICTION.

I am asking the Supreme Court to review the judgment of the 8th Circuit Court of Appeals filed on May 11, 1998 in Fister v. Minnesota New Country School, Case No. 97-2496. (App. 1-4.) Petitioner's timely petition for rehearing was denied on June 12, 1998. (App. 42.) This case was an appeal of Summary Judgement in the District Court filed May 1, 1997 in Fister v. Minnesota New Country School of Civil Action No. 4-96-339. (App. 5.) The action in court was initiated in response to a vote taken on July 9, 1996 of the school board to expel Mary Fister. The expulsion was communicated in a letter sent from the Minnesota New Country School (MNCS) to Mary Fister dated July 23, 1996. (App. 31.) As required by Minnesota Statue (127.31 Exclusion and expulsion procedures) an expulsion hearing preceded the vote. The expulsion hearing occurred on June 28, 1996 and the Hearing Examiner's Report was dated July 2, 1996. (App. 32-35.)

This Petition for Writ of Certiorari is based on U.S.C. Title 28 § 1254.

CONSTITUTIONAL PROVISIONS

The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

The Fourteenth Amendment provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MINNESOTA STATUE

Minnesota Statue 127.29 Grounds for dismissal provides: "A pupil may be dismissed on any of the following grounds:

> "(a) willful violation of any reasonable school board regulation. Such regulation must be clear and definite to provide notice to pupils that they must conform their conduct to its requirements;
>
> (b) willful conduct that materially and substantially disrupts the rights of others to an education; or
>
> (c) willful conduct that endangers the pupil or other pupils, or surrounding persons, or property of the school."

SCHOOL POLICIES

The Minnesota New Country School's Display Policy provided:

> "Displays: Students may decorate their individual work space but all pictures must be placed on bulletin boards, not taped to the wall. However, students may not have pictures/phrases of inappropriate sexual nature, profanity,

> drug, tobacco, or alcohol displayed in the school. Refusal to comply with this rule may result in suspension."

The Minnesota New Country School's Health and Safety Policy provided:

> "Students may in no way endanger the safety, health, or well being of other students or school personnel. Fighting, threatening language, other endangerment or harassment will be grounds for suspension and/or expulsion."

STATEMENT OF THE CASE

This case was brought to the District Court as an action covered under the United States Constitution, specifically the First and Fourteenth Amendments to the U.S. Constitution. The original jurisdiction of this action was stated in the Amended Complaint as following under 28 U.S.C. § 1331.

Mary Fister started the seventh grade at the Minnesota New Country School (MNCS) in June of 1995. At the end of the summer on a MNCS field trip deformed frogs were found and the finding generated national interest. Joe Shea, editor of *The American Reporter*, asked Mary to submit an article for the paper, and she did so. (App. 40-1.) After she submitted the article and it appeared on the Internet she received a letter from the parents of a student at MNCS asking her to remove a portion of the article prior to publication. (App. 39.)

She posted a copy of this letter in her personal work space at MNCS. Over a period of many weeks that followed her posting the letter the school made it known to her that they did not like her doing this, but they did not forbid it. When Mary was not at her personal work area the School removed the letter. She would then post again another copy of the letter. In response to this difficulty, Mary wrote the Minnesota Civil Liberties Union and her parents requested an understanding from the school of whether or not she could or could not post the letter. Specifically, her parents at an advisor's conference asked if she was not allowed to post the letter in her personal work area at the MNCS. Her advisor Dean Lind

told them that he was not stating that she was not allowed to post the letter, but that he did not like her posting the letter.

Eventually the school decided it would not allow Mary to post the letter. She was directed not to post the letter. She stated that she believed she had First Amendment rights, and she continued to post the letter as she found it removed from her personal work area when she came to school in the morning. On April 18, 1996 the school served her notice that she was suspended from school for three days. Mary and I drove to St. Paul and filed a civil action to attempt to obtain a Temporary Restraining Order. We were not successful. On her return to school after the suspension she again posted a copy of the letter in her personal work area. She was suspended again on April 25. The school insisted she sign an agreement that she would not post the letter before she returned to school. She did not sign the agreement. The maximum time allowed for suspension by Minnesota's Pupil Fair Dismissal Act expired, and she returned to school. On June 5 she again posted a copy of the letter in her personal work area, and she was suspended from school pending expulsion. All three notifications of suspension stated that she was suspended for insubordination and did not state any other reason for the suspension. (App. 36, 37. 38.)

The school called for an expulsion hearing. The school provided itself the services of a lawyer to make their case at the expulsion hearing. The school did not provide Mary Fister with the services of a lawyer to make her case at the expulsion hearing. The school attorney and the hearing officer both practiced law in the same county and were acquaintances. They arrived together at the school for the expulsion hearing. The hearing officer found in favor of the school that there was sufficient cause to expel Mary.

After she was expelled and after a settlement conference failed to settle the matter she was allowed by the Court to amend the pleadings. Mary is a fourteen year old with a typical fourteen year old financial resources. Her discovery efforts were constrained. She did not hire a lawyer. Mary and her parents did what they could. We sent interrogatories and filed a motion to compel. We filed a motion for summary judgment to test the idea that the school's display policy was a limited public forum. In summary, we believe we proceeded in good faith through the discovery to do what we could to get ready for trial. Mary realized that at trial she

would only be able to tell her side of the story and question their side of things. After that she would have to let the jury decide the important question of whether or not her posting created a material and substantial disruption.

The school filed a summary motion. In response Mary submitted one measure of the absence of disruption that she had. It was all the email she received after her suspension. Of the 24 messages, only one pertained to the incident.[1] I submitted Mary's response to the MNCS motion for summary judgement and argued in the memorandum that Mary disagreed with the school and that she disputed the fact that there was a substantial disruption. The school won its motion for summary judgment and we appealed. The school won the appeal.

This Petition of Writ of Certiorari is now filed to address the previous rulings of the courts in this case and the questions their rulings raise.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I am asking the Supreme Court to review the case that has been brought to court on Mary Fister's behalf and to consider the questions addressed because I believe both that the questions are important and because I believe the District Court and the Court of Appeals have failed to give Mary Fister an adequate chance to redress her expulsion which was based on the School's judgment that her conduct had "materially and substantially disrupted the educational process" (App. 31)

I believed otherwise and have sought an impartial review. I believe the expulsion hearing that the School provided was not impartial. It was held at the School and the decision was made by school board members none of who excluded themselves from the vote. A majority of the school board members were teachers at the school. Every member of that school board knew Mary and her father and many knew her mother. There had been conflict

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[1] The body of the message stated in full: "I want you to know that I am not on your side. I was at first but now I am not. Please don't send me any of your e-mail, I don't believe that what you are doing is right."

between the family and the school. I do not believe the school's review was impartial.

We came to the Court hoping to obtain at least an impartial trial. The district court decided against that and provided a summary judgment against Mary. The appeals court affirmed that decision. The case did not go to trial.

The School relied on Celotex Corp. v. Catrett, 477 U.S. 317 (1986) in bringing its motion for summary judgment. I think it is an effective decision in understanding the appropriateness of a summary judgment. I have argued before and again state that in Celotex the Court refers to a question of the burden of proof. Celotex held that

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." (477 U.S. 317)

Who has the burden of proof? I claim that the School has the burden of proof regarding the question of disruption of speech. Given that burden, I think the summary judgment against Mary was unfortunate. I think the summary judgment was premature in light of the fact that no substantiated claim of harassment has been provided the Court or the Expulsion Hearing Examiner directly by the individuals who were supposedly harassed. As it stands now the school's burden will not be fully explored. Any question regarding how a simple letter could create material and substantial disruption will go unanswered.

To a large extent that argument has been avoided by an understanding that Mary's speech was not protected by the First Amendment. Both the School and I have relied heavily on Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) and Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988). In Tinker the Court said that

> "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to

> avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." (393 U.S. 503)

The school did not provide evidence of disruption when they suspended Mary. What they did was simply to forbid her expression stating that that her posting was an act of insubordination. This was their official record all the time she was asking for her First Amendment rights. At court the school has argued that Hazelwood sets them free of any burden of the First Amendment. Hazelwood states that this question is about

> "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." (484 U.S. 271)

I claim that in Hazelwood the Court gave the school clear instructions on all that must be understood before the school could construe correctly that Mary's speech was school sponsored. The summary judgment against her means: she will not be able to argue (1) that the personal work area where she posted the letter was not perceived by anyone as bearing the imprimatur of the school or (2) that the personal work area was not part of the school curriculum or (3) that the personal work area was not supervised by school faculty or (4) that the personal work was not designed to impart a particular knowledge or skill.

Apart from the First Amendment issue the School claimed that Mary violated a " reasonable School Board regulation." (App. 31.) In Court they have specified that Mary violated the School policy dealing with harassment. I think had a jury been asked if the letter was harassment that maybe the question and the answers would have been viewed differently. I believe to view Mary's case in a light most favorable to her requires a different answer to the question of who was harassing who and a different question to the answer that her posting was intolerable.

Further had Mary been able to proceed to trial the charge of harassment against her could have been framed as political in nature. Even if her perception of the First Amendment was misplaced, I think she had the right to show that she did not intend to harass anyone. In fact, I do not believe she harassed anyone. The word harassment is a very broad and wide. It is a word that can mean many things. And it is important to note that the official description through the first three suspensions did not include harassment as a description of Mary's action. The school's form used to document her suspensions had a place to write the reason, and the reason hand written in all three suspensions was that she was insubordinate and not that she harassed anyone. The change to harassment was used to insure her expulsion. I believe the change in the description and the appearance of things was a measure of the politics at the root of her case.

I have raised two questions:

- If a public school student is expelled for materially and substantially disrupting the educational process, then does the student have a right to a trial to address the question of disruption?

- If the facts are disputed can a Summary Judgement be granted to the party with the burden of proof?

The first question exists because Mary was expelled for that stated reason in the letter of expulsion sent to Mary (App. 31.) Mary has disputed that she caused a material and substantial disruption. She has offered evidence to the contrary. The second question exists because I believe the burden of proof that she did cause material and substantial disruption resides with the School. We believe summary judgment is inappropriate if the question of disruption can not be fully addressed, and the burden of proof is much less a burden if it can not be examined at trial.

I raised the question

- If a public school utilizes the services of a lawyer in a disciplinary action against a student, is it equally obliged to provide the services of a lawyer for the student against whom it takes the action?

This question exist because the School created an environment that treated the two sides of the First Amendment question that Mary raised unequally. The School afforded itself a lawyer regarding the Mary's posting prior to Mary's initial suspension. The school utilized the services of that lawyer throughout its disciplinary action against Mary. The school did not provide Mary Fister a lawyer. Arguably, they should have, and it would have made a difference. The hearing was conducted like a little court room. The Hearing Examiner even referenced such in his findings when he stated (App. 34) "Based on the aforegoing FINDINGS OF FACT the Court makes the following CONCLUSIONS." It was a Court like thing that was in session and in that context there was an advantage to the School in arming itself with a lawyer without providing Mary the same. We believe that violated a basic sense of fairness rooted in the Fourteenth Amendment

I raised the question:

- Can pure speech which is not per se offensive be considered harassment?

I raised it because the Hearing Examiner found that the letter was per se not offensive. (Finding # 6, App. 32.)

I raised the question:

- Can evidence be controverted by a general claim of its dispute?

When the question is asked whether the jury could find for the plaintiff and the defendant brought the motion for summary judgment, then the answer should proceed in the light most favorable to the plaintiff. (United States v. Diebold Inc., 369 U.S. 654 (1962). In the case of Fister v. MNCS there is no difficulty with that light given the finding of uncontroverted evidence by the district court judge of material and substantial disruption by the plaintiff. If there was dispute regarding the question of material and substantial disruption, then there is a problem precisely because the answer to the question impacts the question of whether there is enough evidence in quality and quantity that a reasonable jury might find for the plaintiff. Therefore the finding by the

district court judge that there was uncontroverted evidence regarding the standard of material and substantial disruption is crucial.

Regrettably, we believe the finding was in error when the District Court stated that "The school has presented uncontroverted evidence that both the Fish boys were severely affected in their schoolwork" (App. 21.) We stated in our Memorandum Against Summary Motion in Favor of Defendant,

> "If it is relevant to the case that Mary Fister was responsible for any disruption at the Minnesota New Country School, then we dispute that fact here as best we are able and as vigorously at trial as is possible if we are permitted."

In that same Memorandum we provided an affidavit from Mary Fister detailing her understanding of disruption as an issue of fact, which stated plainly that she did not think she was or was the cause of any significant commotion at the school. In the same Memorandum we provided evidence[2] in the form of Mary's email inbox, and we stated "[t]he weight of this evidence is in the absence of any sign of significant disruption"

Finally, the main question raised in this petition is

- When does a public school student have the right to free expression in their personal workspace at the public school?

I raised it because we would really like to know the answer, and I think it is an important question for public school students, particularly for secondary public school students. I believe that

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[2] It is worth noting that in the course of discovery we asked for all of the school's scholastic records or reports of any type. Given the school had only 100 students and had been in existence for two years and given that we had a need to find or measure the academic progress of the school to discern an answer to the question of disruption we believed the request was reasonable. The request was denied both by the school and the court as were nearly all our request for documents. (App. 23). Two points follow: 1) there was not a lot of evidence available regarding the question 2) the evidence that remains is largely tied to an individual's viewpoint of what material and substantial disruption would be at the MNCS. In the light most favorable to Mary her affidavit is of the same quality as the affidavits of the entire school board of the MNCS.

Mary's personal work space at the MNCS was conceptually similar to an Internet web page that might be hosted on a public school web server for the student.

Finally, I think what the school did to Mary was wrong. I think if any public school did it to any student it would be wrong. I think, in her case, the context, the special characteristics, and the political element made her expulsion more than just a simple mistake. It demonstrates an abuse of power and the relative unequalness of power when the school takes on a student. And I believe for this case to be resolved in favor of the school without the benefit of trial endangers the First Amendment's protection for secondary school students in public schools.

In the creation of this document my daughter, Mary, asked if she could add something as well. Her comment follows:

> "I believe that the question of what rights a public school student has, has not been fully addressed. I believe my case touches on an important aspect of the missing answer. I believe this because my question is a lot like the same question in the world wide web. My question is: What kind of rights do students have when displaying items in their personal work area at a public school? The Internet is the biggest new medium where students express themselves. What I did has a close parallel to students home pages on the Internet. You post on you home page, and I posted in my personal work area. Although schools are largely governed in the United States by local school boards and their rule is important, sometimes it is also important that their rule be guided by the Supreme Court on Constitutional questions. I think the question I raised is a Constitutional question of tremendous importance to public school students."

Respectfully submitted,

William Timothy Fister
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APPENDIX OF PETITIONER
William Timothy Fister on behalf of Mary Fister

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2496

William Timothy Fister, guardian and parent of Mary Fister,

Appellant,

v.

Minnesota New Country School,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

[UNPUBLISHED]

Submitted: May 7, 1998

Filed: May 11, 1998

Before BOWMAN, Chief Judge, WOLLMAN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM.

Mary Fister appeals from the district court's[1] grant of summary

[1] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

judgment to Minnesota New Country School (MNCS), a charter public school, in her 42 U.S.C. § 1983 action, alleging First Amendment and equal protection violations. We affirm.

The parties' evidence, which we view most favorably to Mary, see Earnest v. Courtney, 64 F.3d 365, 366-67 (8th Cir. 1995) (per curiam), reveals the following. In the fall of 1995, MNCS students were studying deformed frogs found in the area. Mary, a twelve-year-old MNCS student, asked her fellow students for information for an article she was writing on the topic for publication on the Internet. After Mary obtained a quote from an MNCS student for the article, the student's parents wrote the following October 7 letter to Mary:

> Dear Mary:
>
> It has come to our attention you have been soliciting information and quotes from our son . . . regarding the frogs, his feelings about the frogs, and the research surrounding them. . . .[W]e do not want you using information or quotes given to you by our son for publication.

MNCS provided Mary a work space, including a divider on which she could display things; such postings were readily observed by others. In the fall of 1995, the student and his mother noticed that Mary had posted the October 7 letter in her work area, along with a sign stating, "Making a mountain out of a molehill."

MNCS had a written policy allowing students to "decorate their individual work space" but prohibiting the posting of "pictures/phrases of inappropriate sexual nature, profanity, drug, tobacco, or alcohol." Another MNCS policy prohibited students from endangering "the safety, health, or well being of other students or school personnel" in any way, and specified that "[f]ighting, threatening language, other endangerment or harassment" would "be grounds for suspension and/or expulsion."

Dean Lind, Mary's teacher and advisor, attested that after Mary posted the letter, the other student and his brother, as well as the boys' parents, told Mr. Lind the posting was disturbing the boys and was interfering with their ability to receive an education; they

also told Mr. Lind they considered the posting harassment. When Mary failed to remove the posting, MNCS staff removed it; whenever the letter was removed, Mary re-posted it, triggering a pattern of removal and re-posting. The boys' mother continued to complain that the posting was making it "very difficult" for her sons to do their schoolwork.

Mr. Lind attested that the posting and re-posting disrupted education at MNCS, both as to the brothers, and as to students in general. After two instances of being suspended for disobeying the school's directive to remove and not re-post the letter, Mary was again suspended when she posted the letter. Following a hearing, MNCS expelled Mary for a year. In an affidavit presented to the district court, Mary denied engaging in disruptive conduct or noticing any "significant commotion" while she posted the letter; she attributed any commotion, which was neither loud nor "compelling to distraction," to MNCS's disciplinary actions.

The district court entered judgment for MNCS, concluding the school was within its authority in finding that Mary's conduct constituted harassment prohibited by school policy, and in punishing Mary. The court found uncontroverted evidence established that the brothers in question "were severely affected in their schoolwork" because of Mary's "knowing actions" and that her conduct materially and substantially interfered with the school's discipline and operation. The court also rejected Mary's equal protection claim. On appeal, Mary contends that MNCS created a limited public forum, and there was insufficient evidence that the posting caused a disruption or damaged the brothers' academic performance.

We agree with the district court that MNCS did not violate Mary's First Amendment rights, because Mary posted material directed at another student and his family, and school officials had received complaints that the student and his brother felt harassed and were suffering an interference with their education. See Hazelwood Sch. Dist. v. Kulhmeier, 484 U.S. 260, 266 (1988) (noting public school students cannot be punished merely for expressing their personal views on the school premises, "unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'"; (quoting Tinker v. Des Moines Indep. Community

Sch. Dist., 393 U.S. 503, 509 (1969)); cf. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681-85 (1986) (upholding sanction against student for "lewd" speech in student assembly, noting that penalties imposed were "unrelated to any political viewpoint" and that school had to balance student's freedom of expression with society's interest in teaching socially appropriate behavior).

We also reject Mary's limited-public-forum argument because students were not permitted indiscriminate use of their display boards: MNCS had a practice of removing or asking students to remove postings critical of other students or perceived by other students as harassing, and Mary could not recall students ever posting anything offensive or anything directed at anyone else in the school. See Kuhlmeier, 484 U.S. at 267 (school facilities are deemed to be public forums only if school authorities intentionally open facilities for indiscriminate use by general public or by some segment of public).

We further reject Mary's equal protection claim, because she has failed to offer evidence that she was treated differently from others similarly situated to her. See Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994), cert. denied, 513 U.S. 1185 (1995). Finally, we reject any contention that the district court abused its broad discretion in denying Mary's motion to compel production of certain information. See Duffy v. Wolle, 123 F.3d 1026, 1040 (8th Cir. 1997) (standard of review), petition for cert. filed, (U.S. Jan. 27, 1371); In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1490 (8th Cir. 1997).

Accordingly, we affirm the judgment of the district court.

United States District Court
District Minnesota
Fourth Division
4-96-CV-339

William Timothy Fister, guardian
and parent of Mary Fister

ORDER

v.

Minnesota New Country School

Defendant moves to dismiss, pursuant to U.S.C. § 1654, or for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Plaintiff cross-moves for summary judgment. The Court heard oral argument on April 24, 1997.

Based on the files, records, and proceedings herein, and for the reasons given at the hearing, IT IS ORDERED that:

Defendant's motion for summary judgment is granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 1, 1997.

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Court

UNITED STATES DISTRICT COURT

DISTRICT MINNESOTA

FOURTH DIVISION

Civil No. 4-96-339

William Timothy Fister, guardian
and parent on behalf of Mary Fister,
Plaintiff

-v- Motion
April 24, 1997

Minnesota New Country School,
Defendant.

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE JAMES M. RESENBAUM

Minneapolis, Minnesota

APPEARANCES:

For the Plaintiff	William Timothy Fister
For the Defendant	Ehrich L. Koch Arthur E. Anderson

Reported By: Dawn M. Higby Anderson RPR-CM

PROCEEDINGS

THE CLERK: Your Honor, the matter on the calendar is William Fister versus New Country School, Civil No. 4-96-339. Would counsel please stand and state their appearance?

MR. FISTER: My name is William Fister, I'm here on behalf of Mary Fister.

THE COURT: You are not counsel, you are on behalf.

MR. FISTER: Yes.

THE COURT: Miss Fister, good morning.

MR. KOCH: Erich Koch on behalf of Minnesota New Country School. I also have with me my co-counsel, Mr. Arthur Anderson.

THE COURT: There are cross motions. Have you discussed who will proceed first?

MR. FISTER: No.

MR. KOCH: We haven't.

THE COURT: Why don't you pick.

MR. KOCH: As I scheduled the motions, Your Honor, I'd be happy to go forward.

THE COURT: Feel free.

MR. KOCH: May it please the Court, the Minnesota New Country School is here on two motions. The first is a motion for summary judgment. The second is a motion to dismiss, as plaintiff is unrepresented. As I'm sure the Court has read the motion papers and has read the law and such as well, I will be making relatively brief comments and would just like to highlight a portion of the, umm, issues that we're facing for the Court.

The facts in the matter are relatively straightforward in this particular case, umm, plaintiff claims a First Amendment deprivation by the school when it required her to take down a letter that she was continually posting at her work station. The letter was written by one of her colleagues, or the other student's parents asking that she not use information from her sons with respect to a project her sons had going and not to use her name and information from the sons and articles particularly posted on the Internet. Miss Fister posted a copy of this letter at a work station along with a sign she made up which said "making a mountain out of a mole hill." And that was the only expression that she herself actually made. The contents of the letter of course was that of the parents itself. And the only expression she made was to make fun of the letter. So it was a hurtful expression. The letter was up for over two months without comment by the school. And it was not taken down, or anything like that.

The school, however, received numerous complaints particularly from the boys' parents, who were very concerned because it was tremendously upsetting to the two young men students who were involved, and they considered it to be harassment and invasion of their rights, and were very concerned about what it was doing to their abilities to do their school work. And we provided to the Court affidavits and evidence indicating that these two young men were unable to do their school work for this particular year because of the continual posting of this letter. Also, the school was concerned, it is contrary to the mission of this particular school, which is a special, essentially independent school district. Umm, a charter school. And part of its stated mission is to teach generosity, tolerance, fairness, respect for others, and the like, and they found the letter to be extremely disturbing on that grounds as well.

Finally, Your Honor, the posting of the letter was extremely disruptive to the educational process of the school itself. We have submitted affidavits of the school personnel, administrators and teachers, which make it very clear there's a breakdown of order and respect, that the students were focusing on the conflict instead of on their school work, and many students were complaining about what was occurring here. And of course it took a great deal of time away from the teachers. The teachers in this particular school are also administrators. They run their school. So the time

they had to keep dealing with this letter took away from their abilities to teach the other students.

Finally, they found that the letter itself was a violation of the school's policies, which prevent harassment, psychological abuse, that type of behavior with respect to, umm, students. In the responsive papers, umm, plaintiff has made a point, or tried to establish that the posting of the letter was not disruptive, and they have submitted the affidavit of Miss Fister indicating that she didn't yell or scream or make any noise when she was posting the letter. We'd respectfully point out that that is not the only kind of disturbance to education which can occur through some type of speech. In this particular case, plaintiff's expression was deliberately hurtful. It was not speaking up for a disenfranchised minority, it was not expressing an unpopular political viewpoint, it was not expressing a religious viewpoint, or the type of things that the First Amendment was designed to protect. This is only engaging in a bullying behavior. It was hurtful, cruel, deliberate, and it was extremely painful to the other boys, the two Fish boys, whose parents have written the letter. And most disturbingly, the plaintiff knew this. She admits she knew this, she admits she knew they were unable to do their school work because of her posting of the letter. And it was not the kind of speech that the First Amendment was designed to protect. It is particularly not the kind of speech which is protected in a school itself. So all of those kinds of disruptions are disruptions that are used to justify the school's decision to take down this letter.

The work area which she was posting it is not a public forum, it was never intentionally designated by the school as an area for indiscriminate use by the general public. We've established that in our motion papers. Umm, the work area in question is a small posting board that's in front of each student's desk, and the policies of the school, which are written and have been provided to the Court as part of the motion papers, allow students to decorate that area. And plaintiff acknowledges that she understood that policy and knew that, and when asked what was posted by students in that area, had testified, and which is indeed the case, that students post pictures of cars, landscapes, of people and the like, and actually decorate their areas. She admits that her posting of this particular letter of the students was not decorative. And she also acknowledges that this was an area that was not for

use by anyone else other than the students and that no one else ever posted anything that was directed at any specific student, parent, or teacher, such as her letter.

With respect to, umm, the tests, the legal analysis that we need to apply here., it's important to recall that while students do not give up their First Amendment rights at the school, which is on, quoted, their rights in a school are not coextensive with adults out in a public place. The courts are directed by the U.S. Supreme Court to consider the unique circumstances of a public school when considering this analysis, and the court has held a number of times that schools can regulate student's speech in any reasonable manner. Schools are given very broad discretion in this regulation and they may impose, for example, essentials on speech which is contrary to society's fundamental values, and the courts have made very clear this includes the sensibilities of other students. They can also regulate speech in any reasonable fashion if it's reasonably related to legitimate pedological concerns, and these have been held by the courts to include the inculcation, the teaching of appropriate societal values, respect for others, concern for others, and the like.

And here that is exactly what the school did. It regulated Miss Fister's speech by taking down the letter and asking her to take it down, making it very clear why they were taking it down, because it was so hurtful to other students. And so, umm -- excuse -- with respect ot other legitimate concerns that the, umm, school had, of course there was the concern of inculcation of community values, which has been recognized in the Hazelwood v. Kuhlmeier decision. Also in Fraser. Umm, the school is allowed to teach the boundaries of socially appropriate behavior that's been recognized by the courts as another purpose.

Another concern is that the speech in question was being used to crush other children's sense of self-worth, and the courts have been clear that is another legitimate purpose, in for example the Moeller (phonetic) case. We also as a school district are concerned about the invasion of these other students' right. They have a right to a free, appropriate education in an environment which is not harassing, which is not disturbing to them, in which they can exercise their abilities to become educated. That concern has been recognized in the decision of Tinker. /also, again as I

described before, it was disruptive of the educational process itself, and the school as part of its stated mission, and its foundation and existence is to teach trust, decency, fairness, generosity, tolerance, discipline, courtesy, and respect. And those interests have all been recognized by the courts as reason to reasonably regulate students' speech.

Now, one thing which is important to understand, and which plaintiff confuses, is the school does not need to prove that plaintiff's acts caused materially substantial disruption --

THE COURT: Counsel, you were good enough to suggest that I might have already read the briefs, and you even suggested that you might be brief in your arguments. I'm waiting for the part where you've compressed.

MR. KOCH: I see, Your Honor. I will simply skip ahead then. The only point I'd like to make there is that --

THE COURT: By the second time you quoted from the same Supreme Court section I wondered how many times I was going to have to listen.

MR. KOCH: Sure, no, I appreciate -- the only point with respect to Tinker that I wanted to make clear was as plaintiff did not make political speech, the substantial material disruption does not apply. And that was the only significant aspect with respect to that decision I wanted to cover at that point.

The only other thing which, umm, with respect to that, umm, issue, umm, that I wanted to, umm, make particularly clear to the Court is the, umm, umm, pattern that the school used to deal with the speech, that it did warn her numerous times, she was suspended, she promised, and told she could come back if she did not post it again. Continually did so, and the process throughout the entire school year, and the school did deal with the posting of that letter through that entire time.

Skipping ahead to the protection argument, umm, very briefly, Your Honor, the Court of course is well aware of the elements which need to be established for equal protection claim. The plaintiffs did not respond in their reply papers to the motion,

did not come forward with any evidence which would address that claim. So thus ask that that claim be dismissed as well.

Just a quick question for the Court. We do have our other motion, would you like me to address that at this moment or wait until after plaintiff's reply.

THE COURT: You may reply and briefly, if you feel compelled to do so.

MR. KOCH: Very good, Your Honor. I will leave the podium unless the Court has a question at this time.

THE COURT: I have none.

MR. KOCH: Thank you, Your Honor.

THE COURT: Mr. Fister.

MR. FISTER: Thank you, Your Honor. Counsel for defense. Mary, I'll do my best. I'd like to review the umm, the facts of the case.

THE COURT: The Court is quite well familiar, but you may if you feel the need.

MR. FISTER: Just briefly, I do think there are some things needed. The defense just recently just last week gave us some pictures, I'd like to submit them into evidence or at least give them for review. I think it's important to note the very special characteristics of the school. So I have copies for both the Court and for the defense. The defense already has these, in that they submitted these via their, excuse em, defense supplemental response to plaintiff's request for production of document pursuant to court order, so if I could have these admitted to evidence, umm, and I think if you look at those pictures what you're going to see is almost as much as what you're not going to see. You're not going to see a standard classroom of desks. That did not exist.

Also I would just to be brief, I'd like to make a quick quote from the Minneapolis Star Tribune which describes Thomas Hall

where Mary was for the full time that she was contesting her First Amendment rights.

THE COURT: I'm sorry, what did, you're speaking quickly, you said the story describes what?

MR. FISTER: The Minneapolis Star Tribune is a story about MCS, Minnesota Country School, and there's a brief excerpt which describes Thomas Hall, the main building at MCS, and the building Mary was for the most part, for all the part that she was contesting her First Amendment rights. And basically, ah, the article says, umm, in quote, Thomas Hall doesn't feel like the bower [bar] it once was, but it doesn't feel like a provincial classroom either. Teenagers mill about talking of teachers working on computers, sitting at tables in groups, there are no desks, every student has a space at the countertops ringing the room, littered with pop cans, papers and books. And that's it. And I think that the point is, it's very, very different there. And the context of what Mary was doing should be taken in light of where she was.

One thing I do want to point out that the characterization of Mary's statements during deposition, umm , are totally different than what Mary, the characterization that about decorating, stuff like that, that's up for grabs. We certainly see it a lot different than the, ah, than the MCS stated it just now in his statement. I think you already, you know the display policy so I don't need to go over it. Okay, I'll skip by that.

At the end of October the thing I want to review briefly here, at October 1995 Mary did a research project, and she submitted it to Joe Shea, American Reporter, and editor of that newspaper. He said no, redo it, get a couple quotes from students. Mary got on the phone, got a couple quotes from students, put it to the American Reporter, and they published it. After they published it, she got a letter from the Fishes saying, she, she got a letter from another student saying please don't use the quotes from our son. It was too late. I think that's an important point that I want to get across.

The other important point Mary got, she made a copy, she posted it in her work area. Of course she didn't -- there were a lot of things Mary posted in her work area, and this wasn't the only

thing, and she, by the display policy she could have a reason to believe that it was entirely appropriate.

Ah, relative, well relative to the facts, after, umm, she posted it she came back to school, and found that it had been taken down, and no one told her why, it was just gone. She asked, she couldn't find out. She came back and posted another, and again it was taken down. Eventually she asked, she asked, do you know who's taking my letter down? And they said, we are. They would not say at the time you cannot post a letter, they did not tell her that. We, of course, being informed, talked to Dean Lind (phonetic) her advisor. He said he didn't like it. When we said does that mean she can't post it, he wouldn't say that she couldn't post it. He said we don't like it. I don't like it. I think it's like teasing. He never said anything about harassing, he never said anything about disruption. He said it's kind of like teasing. I don't like it. But when asked specifically, and more than once, are you saying Mary can't post it? He said no. He was not saying she couldn't post it. Eventually they got down to writing a letter saying if Mary posts a letter again she will be suspended. She posted the letter again.

I would like to enter another thing into evidence, which they left out of their, ahh, the notification of suspensions. There's four of them. They put three of them in. And the second one is the one they left out. If I could give you this, and give the Court this, all I'm trying to do is complete the, the set of, I want to briefly go over these because I think in some ways you could argue this is the most important document, all four of these. It has great big letters of notification of suspension, and what Dean Linn wrote there is important. As well what he didn't write. He wrote the same thing essentially every time. He hand wrote it. And in three line he wrote the first time on April 18th, not complying with request, do not post the letter from the Fishes. Slow down? Okay.

THE COURT: A little.

MR. FISTER: Thank you. The second time, and he didn't write anything else. That's all there is there. The second time on the 4/25 putting up letter from Fishes, after being directed not to. The third the same, the fourth when Mary wasn't home, they sent an extension, they had plenty of room, they could have said disruption, they could have said harassment but what did they refer

to when it was important when they wrote out the document that essentially made her suspension official? They did not say anything except you're putting up a letter we told you no to. There's a display policy, which Mary relied on, and by that time of course Mary was relying on her First Amendment rights. I think that's the facts as we know 'em. The legal issue want to cover briefly.

Mary will admit, I think, that, yes, it could have been embarrassing to the Fishes, but the letter, you've seen it, it's not a big deal. But embarrassing is covered pretty well in the Supreme Court. I've got Carey v. Population Service International, 431 U.S. 678. The one I'll from, one sentence NAACP v. Claiborn, 458 U.S. 886, and Justice Stevens in that case in the opinion said speech does not lose its protective character simply because it may embarrass others. The question, the other -- legal issue in a sense is there is an agreement between Mary and the school that had a display policy, and the school broke the agreement.

If you go past the display policy and look at the First Amendment, we have submitted a motion for limited public form [forum]. I think it's a neat idea. That essentially the school created a display policy and they didn't say, we're going to give your a grade on this, but you can't put anything you want there. They said you can't put something abut tobacco and this, they didn't put any little letters saying if we don't like it you're going to take it down. It was fairly indiscriminate use after you past the point talking about tobacco and alcohol.

As far as access to the whole population, the Supreme Court has made some reference to the fact this doesn't have to be the whole population. Only has to be part of the population. The part we argue they're referring to is the students. We have that in our brief, so I won't go over it again.

If you get by the limited public forum, and you move to the First Amendment in general, I think Mary's still well protected, given the context if you look at the pictures, given the display policy, given how much noise Mary didn't make, given the fact it's pure speech, we're not talking about any laches, it's pure speech.

THE COURT: Mr. Fister, relax.

MR. FISTER: Okay, Given that it's pure speech, I think she has a very good First Amendment argument, even if the limited public forum doesn't fly.

THE COURT: What did she say? What was her speech?

MR. FISTER: Did she -- I'm sorry, Your Honor.

THE COURT: You say it was speech. What was her expression?

MR. FISTER: Her expression of speech was simply the letter.

THE COURT: Whose letter was it?

MR. FISTER: The letter was from the parents of a boy at the school.

THE COURT: Okay.

MR. FISTER: The letter was from, but it was Mary's letter, and it was, if nothing else it was an example of prior restraint. I can't tell you why exactly Mary put it up, but I'm sure she believes sincerely that she had every right ot put it up. And she certainly was not trying to disrupt anyone. Certainly not trying to cause a harassment. And none was, none was ever mentioned to her other that the school, again, I pointed to the notification of suspension, there is no mention there of harassment

Let me sum up. If you look at the picture, you look at the display policy, you look at the First Amendment, and you've got a decent argument. We think we should at least get to trial. We know in the Fridley case if there's a, actually I'll bring up Fridley. Live with the sword, you die by the sword, I was thinking today, but Fridley has one footnote, which has worried me all week long, then I get here look at Fridley and I was going to use Supreme Court, New Jersey TLO, I think they are neat. I have to take off my glasses to read this, it's small print. But basically in Fridely, which is the case on this court, so it's at 686 F. Supp. 1387. In the

footnote two, it's saying, defendants draw the court's attention to the phrase majority statement the prior Supreme Court --

THE COURT: Sir, you are speedy when you speak freely. By when you read from cold text you are really speedy.

MR. FISTER: I'll slow deliberately down.

THE COURT: Okay.

MR. FISTER: I'm sorry again.

THE COURT: That's okay. When you see smoke rising frmo my reporter's fingers you know your are rapidly reaching that point and they are in flame.

MR. FISTER: It's an interesting quote, last time we were here in loco parentis was a big idea. It's the major idea that Mary competes against in a sense with the First Amendment. Fridley says this, it's one way of looking at this. Defendants draw the Court's attention to the phrase of majority statement that prior Supreme Court decisions recognized the obvious concern of school officials acting in loco parentis, protect you from exposure to sexually explicit, indecent, or lewd speech. This language, however, must be viewed in its proper context. Although school officials concerned for the protection of children derives from the capacity in loco parentis, their authority to protect the children in their schools derives from the state and it's constrained by the Bill of Rights. And we submit that it was constrained by the First Amendment in the Bill of Rights in this case. And that's all I have to say.

THE COURT: Thank you, sir.

MR. FISTER: Thank you.

THE COURT: Do you feel constrained to make a further comment?

MR. KOCH. Just a brief one, Your Honor. Thank you, Your Honor. I just merely wanted to address the photographs that were provided to the Court and counsel at this time and would

invite the Court, umm, attention of page 5 of those photographs, the upper righthand part. The are black and white photographs, and of course difficult to, umm, view, but it gives you some, the Court some indication as the type of things that were posted by the students, and even in the photocopy it's clear that they're photographs, pictures, posters, and the like. I thought that was the only thing I find in those pictures that might be of interest to the Court. Thank you, Your Honor.

THE COURT: Thank you. The defendant seeks dismissal pursuant to 28 U.S.C. Section 1654, or summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. The plaintiff has cross moved for their own motion for summary judgment pursuant to Rules of Civil Procedure 56.

The defendant's motion for summary judgment is granted and plaintiff's motion for summary judgement is denied.

The plaintiff, Mary Fister, appears through her father, presumably in a next friend capacity, William Timothy Fister. Ms. Fister is a resident of St. Peter, Minnesota. The defendant, Minnesota New Country School, is a charter public school, operating in LeSueur, Minnesota. At all times relevant, Miss Fister was a student at the New Country School. She is no longer enrolled there at this time.

In the summer of 1995, students at that school discovered, apparently, frogs of interest in LeSueur County. Miss Fister wrote an Internet article concerning that discovery, and relied upon certain quotes which were obtained from other students. One of the students quoted, Jeffrey Fish, asked her not to use the quotes. As a result, Mr. Fish, or Jeff Fish's parents, wrote to Ms. Fister, and asked her not to use the quotes in her Internet article. Thereafter, Miss Fister posted the Fish parent's letter in her work area at MNCS with a sign, excuse me, stating "mountain out of a mole hill." It is not contested that it remained there, posted, and public, for a period in excess of several weeks.

The Fishes interpreted this action as harassment. And the school officials so informed Miss Fister. The parents of Miss Fister, or Miss Fister, both, asked the school administration why, and they said it approximated or approached teasing. Mr. Fister

argues this morning that harassment is not teasing, but it was clear that the school was concerned in this regard.

The school officials repeatedly removed the letter. Each time they did so, Miss Fister reposted it. Jeff Fish and his brother, appears not to be in controversy, were disturbed by the actions and the posting of the letter, in a fashion which materially contributed to difficulties they had in school. They have each transferred from the school.

Minnesota New Country School officials report that Miss Fister's actions were also disruptive to other students. School officials then later determined that Miss Fister violated the Minnesota New Country School policy which prohibits students from, quote, endangering the safety, health, or well being of other students, close quote, through, quote, fighting, threatening language, or other endangerment or harassment, close quote. I reference here Policy and Operation Procedure, paragraph 14. After this notice, and after advice in that regard on April 19, 1996, Ms. Fister was suspended. Miss Fister sought the temporary restraining order of this Court, which was denied on April 19.

On her first day back at school, subsequent to her suspension, Miss Fister again posted the letter, and was again suspended. The Court does not deem it necessary to go further into the fact that she said that her rights were being violated, put out a memo, et cetera, et cetera, they are not germane to this Court's determination.

At that time the school informed Miss Fister and her parents that any further posting of the letter would result in a suspension and initiation of expulsion proceedings, and in early June 1996, Miss Fister again posted the letter and was suspended as had been suggested.

On July 23, 1996, Miss Fister learned that the school board of the Minnesota New Country School had expelled her for a period of a year. And now through her father she files an amended complaint with the Court on November 19, 1996, and alleges that the Minnesota New Country School violated her First Amendment right to freedom of speech and her 14th Amendment right to equal protection and seeks to have the expulsion lifted.

The defendant now argues, among other things, that its discipline of Miss Fister fell within its authority, and as such did not violate Miss Fister's constitutional rights. The defendant further argues that it treated Miss Fister no differently than any other similarly situated child who had done the same sorts of things.

It is axiomatic that summary judgment is appropriate if there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law, referring to Federal Rule of Civil Procedure 56(c), and Celotex v. Catrett at 477 U.S. 317 at pages 32 and 23, and its companion case Anderson V. Liberty Lobby at the same volume, page 242 at page 246, 1986. Each party agrees there is no factual dispute, and the matter is ripe for summary judgment.

Concerning the First Amendment claim, it is clear that although students are entitled to certain First Amendment protections, it is settled that, quote, the constitutional right of students in public school are not automatically coextensive with the rights of adults in other settings. I cite Bethel School District v. Fraser at 478 U.S. 675 at 682, 1986. Schools, whose duties include teaching values and civility, are properly accorded great latitude in determining what manner of speech is appropriate in the classroom, citing the same case at page 683. Therefore, while the school may not bar speech that merely expresses the students' personal views, a school may punish students whose speech, quote, materially and substantially interferes with the requirements of appropriate discipline and the operation of the school, closing the quote, and that is from Tinker v. Des Moines at 393 U.S. 503 at page 509, 1969; and further reiterated at Hazelwood v. Kuhlmeier at 484 U.S. 260, at 266, 1988.

Here, the Court finds that based on the facts adduced before the Court, Minnesota New Country School acted within its authority in punishing Miss Fister. The school apparently prohibits speech that threatens or harasses other students. The fine distinction which has been argued that teasing, and teasing here which is clearly known to be disturbing to another student, is not harassment. The reality is that they were children who were unhappy with what was being posted, and not because of the nature of political view, but simply because they felt it was harassment.

Now, in that view, and material and substantial interference within the contemplation of Tinker, was well fulfilled. Thus Minnesota New Country School did not act beyond its bound in determining that Miss Fister's posting of the letter constituted harassment with the contemplation of the policy. The school has presented uncontroverted evidence that both the Fish boys were severely affected in their schoolwork as a result of Miss Fister's knowing actions, and although Miss Fister was free to disagree with the Fishes' reaction to her articles, she was no free to continually express her disagreement in a mode which interfered with her colleagues' education.

I now determine further that even if this was a First Amendment protected posting, and at this moment I need not make that determination, it was posted for a full two months. She had a chance, therefore, to express herself to the full. And a reasonable regulation under these circumstances did not in any fashion impair her rights. And on that claim, summary judgement is therefore granted in favor of the defendant.

With respect to the second equal protection claim, quoting again, the first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her, closing quote. Cite Klinger v. Department of Corrections at 31 F.3d 727, 731, Eighth Circuit 1994. Here the plaintiff has made no such showing whatsoever, and in fact did not reply to this branch of the argument in any fashion. She does not even suggest that she was treated differently than anyone else at Minnesota New Country School, let alone proffer any evidence in that regard.

In the face of an adequately and accurately placed motion for summary judgment, as to which no objection has been made and no contrary evidence has been submitted, summary judgment is granted on the equal protection claim. Therefore, both claims are rejected on the basis of summary judgment, and the defendant's motion is granted, and the plaintiff's motion is denied. And that'll be the ruling of the Court.

(Recess.)

United States District Court
District Minnesota
Fourth Division

William Timothy Fister, guardian
and parent of Mary Fister — Civil Action 4-96-339

Plaintiff,

V. — ORDER

Minnesota New Country School

Defendant.

William T. Fister, PRO SE.
Sheila Bjorklund, Esq., for the defendant.

THIS MATTER came for hearing before the undersigned United States Magistrate Judge on April 3, 1997, on plaintiff's motion to compel discovery.

Based upon the files, records, and proceedings herein,

IT IS HEREBY ORDERED that:

1. Plaintiff's motion to compel discovery is GRANTED IN PART and DENIED IN PART as follows: [#58]

    a. With respect to Interrogatory No. 7, plaintiff's motion is denied.

b. With respect to Interrogatory No. 8, plaintiff's motion is granted.

c. With respect to Interrogatory No. 9, plaintiff's motion is denied.

d. With respect to Interrogatory No. 10, plaintiff's motion is denied.

e. With respect to Interrogatory No. 11, plaintiff's motion is denied.

f. With respect to Interrogatory No. 12, plaintiff's motion is denied.

g. With respect to Interrogatory No. 14, plaintiff's motion is denied.

h. With respect to Interrogatory No. 15, plaintiff's motion is granted to the extent he seeks the names of the Minnesota New Country School (MNCS) board members present at the meeting at which the MNCS Board voted to expel Mary Fister.

i. With respect to Interrogatory No. 16, plaintiff's motion is denied.

j. With respect to Interrogatory No. 17, plaintiff's motion is granted

k. With respect to plaintiff's Requests for Production of Documents, plaintiff's motion is denied except the defendant shall provide photographs of activities in and around the school for the period of January 1, 1994 to the present.

Dated April 7, 1997

/s/ Franklin L. Noel
FRANKLIN L. NOEL
Chief Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2176MNMI

In re:	*	
	*	
William Timothy Fister, guardian	*	
And parent on behalf of	*	Petition for Writ
Mary Fister,	*	of Mandamus
	*	
Petitioner.	*	
	*	

JUDGMENT

Petition for writ of mandamus has been considered by the court and is hereby denied.

May 13, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court
District Minnesota
Fourth Division
4-96-CV-339

William Timothy Fister, guardian
and parent of Mary Fister

ORDER

v.

Minnesota New Country School

The plaintiff, by her father, William Timothy Fister, has made a second application for a temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure. A telephone hearing was held on May 6, 1996.

The plaintiff's father is not an attorney admitted to practice in this Court or in the Supreme Court of any state. Mr. Fister is permitted to represent his daughter, pro se, in this Court. Plaintiff and her father are advised, however, that although pro se pleadings are subject to a deferential review, they must comport with the rules of the United States courts. Faretta v. California, 422 U.S. 806, 834-35 n.46 (1975); Schooley v. Kennedy, 712 F.2d 372, 373 (8th Cir. 1983).

Based on the files, record, and proceedings herein, and for the reasons stated at the hearing, IT IS ORDERD that:

1. Plaintiff may submit an amended motion which complies with the rules of the Court.

2. Plaintiff's motion is denied without prejudice.

Dated: May 7th, 1996

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT MINNESOTA

FOURTH DIVISION

Civil No. 4-96-339

William Timothy Fister, guardian
and parent on behalf of Mary Fister,
Plaintiff

-v- Telephone Conference
May 6, 1996

Minnesota New Country School,
Defendant.

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE JAMES M. RESENBAUM

Minneapolis, Minnesota

APPEARANCES:

For the Plaintiff — William Fister, Pro Se

For the Defendant — Arthur Anderson

Reported By: Dawn M. Higby Anderson RPR-CM

PROCEEDINGS

(Roll call by AT&T operator: Mr. Anderson? Present. Mr. Fister? Present. Miss Fister? Present. Judge Rosenbaum.)

MR. ANDERSON: Judge, I also have Dean Lend here.

MR. FISTER: And my wife is on the phone upstairs.

THE COURT: All right. And what is your wife's name?

MRS. FISTER: Barbara Fister.

THE COURT: The matter is before the Court on an application for an additional restraining order filed over the signature of Mr. Fister. And the reason I called was, Mr. Fister, your are not an attorney. Your are not admitted to practice in this court. I was willing to permit you to take some steps previously on the last appearance, but this is not a place where you will be permitted to plead. The rules do not provide for it. You do not have the competence to represent your daughter in the matters that are before the Court, and I cannot permit that. And it didn't seem reasonable for people to come dragging all the way to Minneapolis to hear that.

MR. FISTER: Can I make a motion, a request on my daughter's behalf?

THE COURT: Who's speaking?

MR. FISTER: This is Mr. Fister.

THE COURT: Mr. Fister, you do not have the power nor the authority nor the training to make a motion.

MR. FISTER: I don't understand all of what you're saying but I certainly have the interest to make a motion and I'm trying to represent my daughter's interests.

THE COURT: What I'm telling you, sir, you are not permitted to represent your daughter's interest.

MR. FISTER: In your courtroom, sir?

THE COURT: In the United States District Court. You're not an attorney.

MR. FISTER: Could I entertain a motion for summary judgment, or is that also out of line?

THE COURT: Sir, it is questions like that that are the reason you are not permitted to make motions or plead in this court. On that basis, sir, at this time there is nothing before me. And I will not entertain any motions at all.

MR. FISTER: Is the suit still before you?

THE COURT: Sir, why don't you consult with an attorney. Right now I have a filing that's before the Court. Okay?

MR. FISTER: Well, not okay by us, sir, but I have to accept your judgment, don't I?

THE COURT: Well, on the basis of the fact there's nothing pending before the Court, there's nothing further for the Court to do at this time, and the hearing, unless there's objection, will be --

MR. FISTER: Well, I do object, and I'd like to raise a motion for summary judgement on this matter.

THE COURT: All right. Well, that motion, since you lack either standing or competence to make such a motion, and I mean that in a legal sense, sir, as opposed to any other, I refuse and decline to entertain such a motion. Thank you very much.

(Pause.)

THE COURT: You're permitted to say good-bye, gentlemen.

MR. FISTER: Good-bye.

MR. ANDERSON: Good-bye.

(Recess.)

(3/94)
Minutes of Proceedings* (x) Judge ( ) Magistrate James Rosenbaum
Motions Reporter/Tape No. Dawn Sampson

United States District Court, District of Minnesota 4th Division

William Fister, et al.	*William Fister*
	Mary Fister
	Barbara Fister
Plaintiff(s)	Plaintiff(s) Counsel

Vs. Civ *4-96-339*

Minnesota New Country School	*Arthur Anderson*
Defendant(s)	Defendant(s) Counsel

Phone Conference
(x) Moition Minutes

ORDER TO BE SUBMITTED BY: (x) court ( ) plaintiff ( ) defendant

Pro Se motion re: expulsion - denied. The Court has nothing before it.

ORDER TO FOLLOW.

Dated: *5-6-96*

/s/ unreadable
(x) Deputy Clerk ( ) Magistrate

* This is a detailed representation of a form completed by hand by the Court.

United States District Court
District Minnesota
Fourth Division
4-96-CV-339

William Timothy Fister, guardian
and parent of Mary Fister

ORDER

v.

Minnesota New Country School

This Matter is before the Court on plaintiff's motion for a temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure. The Court heard oral argument on April 19, 1996.

Based on the files, records, and proceedings herein, and for the reasons given at the hearing, IT IS ORDERED that:

Plaintiff's motion is denied.

Dated: April 23, 1996

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

July 23 1996

Mary Fister
314 South Third Street
St. Peter, MN 56082

Dear Mary:

You are hereby given notice, and this letter shall constitute such notice, that by appropriate action taken by the School Board of Minnesota New Country School ISD #4007 at a special closed meeting held July 9, 1996 you are expelled from attendance at Minnesota New Country School ISD #4007 for a period of one (1) year from and after July 9, 1996.

This action was taken by the School Board based upon a finding that you engaged in conduct and activity which constituted a willful violation of a reasonable School Board regulation and direction which willful conduct on your part materially and substantially disrupted the education process of others in the school.

As and for alternative education, you are direct to seek such education in the public school system in St. Peter, Minnesota, of which municipality you are a resident.

MINNESOTA NEW COUNTRY SCHOOL
#4007

BY: /s/ Malcolm Maxwell
Malcom Maxwell, Chair

cc: Tim Fister
Barbara Fister

IN RE THE DISMISSAL OF MARY FISTER

FINDINGS, CONCLUSIONS
AND RECOMMENDATION

A dismissal hearing was held on Friday, June 28th, 1996 regarding the dismissal of Mary Fister before the undersigned Michael T. Keogh acting as independent hearing examiner. The Minnesota New Country School, I.S.D. No. 4007, hereafter MNCS, appeared by and through its counsel, Arthur E. Anderson, of Le Sueur, Minnesota. The pupil, Mary Fister, appeared on her own behalf and by and through her father, Tim Fister. Based upon all the files records, exhibits and testimony taken the hearing examiner makes the following FINDINGS OF FACT:

1. That the hearing was conducted in closed session. The pupil and her parent were given an opportunity to request an open hearing which they declined.

2. During the 1995-1996 school year the pupil, Mary Fister, was a seventh grade student at MNCS.

3. That testimony was taken from Dean Lind, the pupil's advisor and instructor, and from MNCS advisor and instructor Kim Borwege.

4. That during the 1995-1996 school year a dispute arose between Mary Fister and another student regarding a student project. That the other student's parents wrote a letter to pupil, Mary Fister, requesting that she not use information or quotes from their son regarding the research project. The letter was sent by mail to Mary Fister's home.

5. A week or so prior to February 14th, 1996, the pupil, Mary Fister, posted on her bulletin board near her work area the letter from the other student's parents.

6. The letter is not per se inappropriate or offensive

7. The parent who wrote the letter to Mary Fister has two students in MNCS.

8. That these two students viewed the posting by Mary Fister as inappropriate and in the nature of harassment.

9. These feelings were communicated to advisors at MNCS.

10. On February 14th, 1996 an advisor of MNCS met with the pupil, Mary Fister, and her parents and advised that the letter she had posted was disruptive to the other students and was viewed as harassment by the two students whose parent had written the letter. The advisor directed that the letter be taken down and not posted on the bulletin board. Between February 14th, 1996 and April 18th, 1996, the pupil, Mary Fister, continued to repost copies on at least five occasions. Each time another copy would be posted an advisor at the school would ask that Mary remove it or remove it themselves.

11. MNCS has in place a policy prohibiting pupils from posting any material that is objectionable or interferes with the learning process of other students.

12. On April 18th, 1996, MNCS suspended the pupil Mary Fister, for three days commencing April 19th, 1996 because of the pupil's continued posting of the letter after being directed not to do so on numerous occasions by MNCS staff.

13. The reason stated for the suspension was insubordination for continual posting of the letter in violation of school policy.

14. The pupil, Mary Fister, on April 18th, 1996, posted a statement on her bulletin board "I have been suspended for (in my opinion) no real reasons. This school has violated my rights." signed Mary Fister.

15. On April 18th, 1996, Mary Fister sent an E-Mail to all the students at MNCS which states: "I have been suspended. If you want to know why, ask around, about haalf (sic) the people in Thomas hall know the story. I don't know when I'll come back. The school has violated my rights. The gong is vibrating. (sic)"

16. The pupil, Mary Fister, served her three day suspension commencing April 19th, 1996.

17. Mary Fister returned to school following the initial three day suspension and on April 25th, 1996 again reposted the subject letter.

18. MNCS gave Mary Fister notice of suspension for five days beginning April 25th, 1996.

19. Following the second suspension the pupil, Mary Fister, posted the following notice on her board. "The school has suspended me twice because of something I have posted in my person work area. They are now saying that they will expel me if I post it again. I believe my first amendment rights are being violated and denied."

20 On June 24th, 1996, Mary Fister again reposted the letter after returning from the second suspension. She was notified of the suspension for posting the letter after being notified that doing so would result in an additional five day suspension pending expulsion.

21. The school provided modification of the pupil's schedule to permit completion of school work allowing her to complete seventh grade in a timely manner.

Based on the aforegoing FINDINGS OF FACT the Court makes the following CONCLUSIONS.

1. The school provided an alternative education program prior to the dismissal proceeding which permitted her to complete seventh grade.

2. That the repeated posting of the letter constitutes a willful violation of a reasonable school board regulation.

3. That the repeated posting of the letter in violation of school policy constituted willful conduct on the part of the student which materially and substantially disrupted the education process of others in the school.

Based upon the aforegoing, it is hereby recommended that there is sufficient cause for dismissal of Mary Fister form the Minnesota New Country School.

Dated: July 2, 1996.

/stamped/ MICHAEL T. KEOGH
Michael T. Keogh
Hearing Officer

MINNESOTA NEW COUNTRY SCHOOL*
DISTRICT #4007
NOTIFICATION OF SUSPENSION

Dear Parents and Student:

Mary Fister has been suspended from the Minnesota New Country School for *5* days because of the following infraction(s):

Posting letter from the Fish's after being notified doing so would result in 5 day suspension pending expulsion.

Suspension will begin *immediately* ~~at 8:30 AM.~~ The student may return to school on _____ at 8:30 AM provided there is a parent/advisor conference prior to returning to school.

If there are any questions regarding this suspension, please feel free to call the school at 612-665-4033. Refer to the discipline policy guide for reference, which was mailed to each family and given to each student.

/s/Dean C. Lind Advisor **

6/4/96 Date

(Copies will be made for the student's permanent record. The Student Fair Dismissal Act of 1974 may be implemented after the first suspension upon advisement of Board.)

---

* This is a detailed representation of a form completed by hand by the School

** At some point after the initial document was created the following was handwritten in: "The date is wrong. The suspension occured (sic) on June 5, 1996. " signed Dean Lind.

MINNESOTA NEW COUNTRY SCHOOL*
DISTRICT #4007
NOTIFICATION OF SUSPENSION

Dear Parents and Student:

Mary Fister has been suspended from the Minnesota New Country School for *5* days because of the following infraction(s):

Putting up letter from Fishs after being directed not to.

Suspension will begin *4/25* at 8:30 AM. The student may return to school on *May 2* at 8:30 AM provided there is a parent/advisor conference prior to returning to school. **

If there are any questions regarding this suspension, please fee free to call the school at 612-665-4033. Refer to the discipline policy guide for reference, which was mailed to each family and given to each student.

/s/ Dean C. Lind Advisor

4/25/96 Date

(Copies will be made for the student's permanent record. The Student Fair Dismissal Act of 1974 may be implemented after the first suspension upon advisement of Board.)

---

* This is a detailed representation of a form completed by hand by the School

** The statement "See letter dated 4/25/96" was handwritten here near the right margin.

MINNESOTA NEW COUNTRY SCHOOL*
DISTRICT #4007
NOTIFICATION OF SUSPENSION

Dear Parents and Student:

Mary Fister has been suspended from the Minnesota New Country School for *5* days because of the following infraction(s):

Not complying with requests to not post a letter from the Fishs.

Suspension will begin *4/19* at 8:30 AM. The student may return to school on *4/24* at 8:30 AM provided there is a parent/advisor conference prior to returning to school.**

If there are any questions regarding this suspension, please fee free to call the school at 612-665-4033. Refer to the discipline policy guide for reference, which was mailed to each family and given to each student.

/s/ Dean C. Lind Advisor

April 18, 1996 Date

(Copies will be made for the student's permanent record. The Student Fair Dismissal Act of 1974 may be implemented after the first suspension upon advisement of Board.)

---

* This is a detailed representation of a form completed by hand by the School

** The statement "Please refer to the letter dated April 17" was handwritten here near the right margin.

Oct 7, 1995*

Dear Mary:

It has come to our attention you have been soliciting information and quotes from our son, Jeff, regarding the frogs, his feelings about the frogs, and the research surrounding them. As Jeff's parents, we do not want you using information or quotes given to you by our son for publication.

Sincerely,

/s/ Tom Fish

Mr. and Mrs. Fish

---

* This is a detailed representation of the copy of the letter posted by Mary Fister in her personal work area at the Minnesota New Country School.

Mary Fister
St. Peter MN
deformed frogs
10/5/95
606/$6.06

STUDENTS SEEK CAUSE OF FROG DEFORMITIES

by Mary Fister
American Reporter Correspondent

HENDERSON, MN – In August, Cindy Reintz, a teacher at the Minnesota New Country School, took a group of students on a nature walk on the Ney farm in Henderson, MN. They caught some frogs and realized they were "weird". They were surprised to find that a large number of the frogs they caught that day had deformities.

The Minnesota New Country School is an innovative new charter school located about ten miles south of the frog pond in the small town of LeSueur. Around 90 students are enrolled, and there are five teachers—at this school, called advisors. Students work at their own pace and design individual projects, choosing their own way to fulfill the school's curricular goals. The school has a strong technology program to support student work. The three classroom buildings house about 40 computers, three printers, two scanners, and are connected to the Internet.

The students who found the frogs are striving to understand the cause of their deformities. Around fifteen students go to the pond once or twice a week and hold frog meetings to update each other on what's happening. Students are both fascinated by the discovery they made and worried by it. Jeff Fish, a thirteen year old student, said "At first I thought it was weird; now I think it's cool." But Reta Bovee, seventh grader, said "I feel really sorry for them. It must be miserable trying to hop."

In all, they have caught between 350 and 420 frogs. They estimate that half of the frogs at the pond are deformed. Almost all of the deformities appear in the hind quarters. Most of the abnormal frogs have poorly formed legs. Some have tumors or no pigment in their legs. A large number have multiple or missing limbs. One that they caught had no hind legs at all. Some had extra webbed feet; a few had missing eyes.

There have been reports of deformed frogs from sites located in a three mile radius from the pond. Some students speculate that if these abnormalities are hereditary the deformed frogs in the surrounding area might have been "leftovers" from when they migrated to the Ney farm.

Students' inquiries on Internet have yielded a number of theories offered by scientists and biology students around the world. It has been suggested that pesticide containers may have been rinsed out with pond water, and the water returned to the pond. Others raised the possibility of heavy metal contamination, parasite infestation of developing frogs, or illegally dumped chemicals. Some believe that the thinning ozone layer may have played a role by allowing harmful UV radiation to affect eggs laid in shallow water. Some also suggest that this could be a natural aberration, that a single frog laid all of the deformed frog eggs, passing along a genetic mutation.

Numerous tests and observations have been made both by students and by state authorities concerned about the phenomenon. Students determined that the pH level of the water is 9.5, much higher than average. The pond appears to have a healthy ecosystem, with many plants and animals. Scientists have taken samples of soil and water and are conducting tests for the presence of heavy metals, but the results are not yet available. Scientists also plan to breed pond frogs caught by the students to see if the deformities are hereditary. Meanwhile, the students at the Minnesota New Country School are using the unusual discovery to learn more about science and, perhaps, through their efforts to contribute to an understanding of the frogs' deformities and their cause.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2496MNMI

William Timothy Fister,

Appellant,

Order Denying
Petition for Rehearing
and Suggestion for
Rehearing En Banc

vs.

Minnesota New Country School,

Appellee.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 16, 1998

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
OCT 8 1998
OFFICE OF THE CLERK

(2)

No. 98-410

In the

Supreme Court of the United States

October Term, 1998

William Timothy Fister,
guardian and parent on behalf of
Mary Fister,

Petitioner,

v.

Minnesota New Country School,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

A. Introduction.

Petitioner William Fister, on behalf of his daughter Mary Fister, appealed to the United States Court of Appeals for the Eighth Circuit from the United District Court for the District of Minnesota's grant of summary judgment in favor of Respondent/Defendant Minnesota New Country School (MNCS), a charter public school. The district court dismissed Petitioner's 42 U.S.C. § 1983 action in which he alleged First Amendment and equal protection violations. (Petitioner's Appendix [P.A.] 5.) The United States Court of Appeals for the Eighth Circuit, in an unpublished per curiam opinion, affirmed. (P.A. 1.)

In seeking certiorari from this Court, Petitioner has failed to set out accurately the record upon which summary judgment was granted and affirmed. Petitioner makes assertions of "fact" which have no record support. It is therefore necessary for MNCS to present this statement of the case.

B. MNCS and Its Policies.

MNCS is a relatively small public school in Le Sueur, Minnesota, which serves approximately 85-90 middle and secondary students. During the 1995-96 school year, Mary Fister was a seventh grade student.

MNCS distributed a document entitled "MNCS Discipline Policy and Operating Procedures, Daily Operating Procedures, 1995-1996" (MNCS Policy) to its students. Paragraph 14 entitled "Health and Safety" states as follows:

> 14. Health and Safety: Students may in no way endanger the safety, health, or well being of

> other students or school personnel. Fighting, threatening language, other endangerment or harassment will be grounds for suspension and/or expulsion.

The MNCS Policy further provides that unless otherwise indicated, any violation of these MNCS policies were subject to Minnesota's Fair Pupil Dismissal Act of 1974, Minn. Stat. § 127.29, which governs a school's dismissal of a student. Minn. Stat. § 127.29, subds. 2(a) and (b), provide that a pupil may be dismissed for "willful violation of any reasonable school board regulation" or "willful conduct that materially and substantially disrupts the rights of others to an education."

For the first infraction of a school policy, parents are notified by mail that a three-day suspension might result and a parental conference held before readmittance. For the second infraction, parents are notified by mail and expulsion proceedings may be instituted by MNCS. Mary Fister admitted she had read and understood MNCS's policies. She understood that "harassment" would be grounds for suspension and/or expulsion from MNCS.

Each student at MNCS had a designated work space provided by the school which consisted of a table and a chair, with a divider directly in front of the student's desk that a student could pin things on. Paragraph 12 of the MNCS Policy provides in part as follows:

> 12. Displays: Students may decorate their individual work space but all pictures must be placed on bulletin boards, not taped to the wall. . . .

While students were allowed to decorate these areas, any item viewed to be of an inappropriate nature would be taken down by the MNCS staff. As a student at MNCS, Mary Fister understood that certain things should not be posted at a student's work space.

C. Harassment by Mary Fister.

In the summer of 1995, MNCS students were the first in the state of Minnesota to find deformed frogs. Mary Fister set out to write an article on the frogs which she planned to publish on the Internet. To obtain information for her Internet article, Mary Fister, who was not involved in the frog project, spoke with other students who were involved in the project.

Mary Fister persistently sought information from Jeff Fish, one of the students involved in the frog project. Jeff Fish did not want to give Mary Fister information. Mary Fister continued to request information from Jeff Fish and demanded that he fill out a questionnaire on the subject. Jeff Fish refused. Mary Fister continued to demand information. Jeff Fish became intimidated by Mary Fister and eventually provided the information sought by Mary Fister. Mary Fister published her article using quotes from Jeff Fish and other students without their permission.

On October 7, 1995, Jeff Fish's parents wrote Mary Fister the following letter:

> Dear Mary:
>
> It has come to our attention you have been soliciting information and quotes from our son...regarding the frogs, his feelings about the frogs, and the research surrounding them.... [W]e do not want you using information or quotes given to you by our son for publication.

Mary Fister made no attempt to remove references to Jeff Fish in her article. When asked why, she responded, "Because, I didn't see any reason why they would have a problem with the quote."

In an attempt to resolve the matter between Mary Fister and Jeff Fish, on October 11, 1995, Sandra Fish (Jeff's mother), Mr. and Mrs. Fister and MNCS representatives met at MNCS. Nothing was accomplished. Mr. Fister allowed others very little opportunity to speak. He was verbally abusive and shouted loudly at those present throughout the meeting. Mr. Fister even made a lewd gesture at one of MNCS's teacher/advisors. (Respondent's Appendix [R.A.] 13-14, 27.)

Following this meeting, Mary Fister posted the Fishes' October 7, 1995 letter to her at her work place at school. She also put up a sign that said "Mountain out of a mole hill" with an arrow pointing from it to the Fishes' letter.

MNCS was informed by Jeff and Scott Fish (Scott is Jeff's brother and was also a student at MNCS), as well as their parents, that they felt the posting of the letter constituted harassment. Mary Fister's action was viewed as both disrespectful and degrading to the Fish family. Mary Fister's advisor, Dean Lind, told Mary Fister that the Fish boys and the Fish family felt the posting of the letter constituted harassment and told her to take it down. (R.A. 31.)

Mary Fister admits nothing posted by other students at their work spaces was "offensive." Mary Fister admits she did not see anything posted by other students which was directed specifically at somebody else in the school such as a teacher or another student. Nothing similar to the "Fish letter" was ever posted by another student. The letter remained posted for two months before anyone at MNCS took it down the first time. Thereafter, whenever the letter was removed by

the MNCS staff, Mary Fister immediately would repost another copy of the letter.

Mary Fister was aware of the MNCS policies while she was continually posting the Fish letter. She has admitted that she was aware that her actions were viewed as being in violation of the school's harassment policy and that she could be suspended if she continued posting the letter.

Despite being specifically aware of the destructive and disruptive effect that her posting the letter had or could have on her colleagues, that her actions were viewed as constituting harassment and that she could be disciplined for her actions, Mary Fister deliberately reposted the letter continually throughout the entire school year. She admits she reposted the letter "whenever they took it down."

Mary Fister's continual reposting of the letter resulted in a material and substantial disruption of the educational process at MNCS. Teachers at MNCS described how the students, rather than focusing on their school work, were focusing on the conflict that the posting of the letter created. (R.A. 18, 23, 29.)

Evidence was presented that the reposting of the letter affected the Fish boys directly. Teacher Cindy Reinitz observed that every time Jeff Fish saw the letter reposted by Mary Fister he would come into her building "very distraught." (R.A. 24.) Jeff Fish would become so emotionally distraught that he was unable to work on his curriculum for the remainder of the day. (R.A. 25.) After the posting, Jeff's grades at MNCS were "incomplete in all sections." Previously Jeff had always been a good student. (R.A. 15.)

Teacher Nancy Miller described Jeff Fish as "ordinarily a very outgoing, upbeat and interactive personality." However, when in the presence of Mary Fister, Jeff would become quiet and extremely uncomfortable. (R.A. 22.) Mary Fister's actions toward the two Fish boys ultimately had such a severe

impact upon them that they chose to enroll in another school. (R.A. 16-17.)

Mary Fister was told that the Fish boys felt harassed and that they were unable to do their school work because of her actions. She claimed, "I don't know" when asked whether she cared if she hurt or upset either of the Fish boys. She similarly claimed, "I don't know" when asked if she gave any thought at all to the effect that the letter would have on others when she posted it.

D. History of Mary Fister's Suspensions and Expulsion.

Dean Lind advised Mary Fister and her parents on February 14, 1996, that the letter she had posted was disruptive to the other students and was viewed as harassment. (R.A. 31.) Mary Fister and her parents were also informed that her actions interfered with Jeff Fish's education and that she was acting in violation of the MNCS Policy and Minnesota's Fair Pupil Dismissal Act of 1974. On April 17, 1996, Dean Lind informed Mary Fister and her parents, in writing, that the letter she was posting served no educational purpose and was perceived to be harassment. (R.A. 7.) They were informed that if Mary Fister posted the letter one more time the school would have no choice but to suspend her for three days. (Id.) Mary Fister posted the letter again and was suspended beginning on April 19, 1996 for three days. (R.A. 31.) It should be noted that a full six months had elapsed between the first time Mary Fister posted the letter and her first suspension.

Upon receiving her first suspension, Mary Fister immediately sent an e-mail to all of the students at MNCS which stated:

> I have been suspended. If you want to know why, ask around. About half the people in Thomas Hall know the story. I don't know when I'll come back. The school has violated my rights. [T]he gong is vibating [sic].

The school never objected or disciplined her for sending this e-mail.

Mary Fister was told that if she continued to post the letter that it was likely she would be suspended again, this time for a longer period of time. She was also told that expulsion was possible if she continued in this fashion. Mary Fister reposted the letter on the morning of her first day back from her suspension.

Dean Lind once again explained to Mary Fister that the Fish boys felt harassed and were unable to do their school work. She was also told that MNCS did not like suspending her and wanted her back in school. By letter of April 25, 1996, Dean Lind gave notice that Mary Fister was being put on a five-day suspension. (R.A. 8.) The grounds for suspension were violation of paragraph 14 of the MNCS Policy. She was also suspended pursuant to Minn. Stat. § 127.29, subds. 2(a) and (b), due to her willful violation of any reasonable school board regulation and willful conduct which materially and substantially disrupted the rights of others to an education. (Id.) She was told once again the posting was disruptive to the entire school and must stop. (Id.)

Dean Lind wrote another letter to Mary Fister and her parents specifically putting them on notice that "[i]f Mary continues to insist on posting the letter from the Fish's when she returns to school, she will be put on an immediate five (5) day suspension at which time MNCS will begin expulsion proceedings." (R.A. 9.)

Upon her second return to school, Mary Fister immediately posted a handwritten sign which stated:

> The school has suspended me twice because of something I posted in my personal work area. They now are saying that they will expel me if I post it again. I believe that my First Amendment rights are being violated and denied.

Mary Fister admits the sign was never taken down and she was not disciplined for putting up the sign.

Mary Fister also put up another sign which stated: "I have been suspended for (in my opinion) no real reasons. This school has violated my rights." Mary Fister admits she was never disciplined for posting this sign.

Mary Fister once again posted the Fish letter. She was notified of her suspension on June 5, 1996 by Dean Lind. (R.A. 10.) She also received a letter to this effect and expulsion proceedings were initiated.

On June 28, 1996, an expulsion/dismissal hearing was held before an independent hearing examiner. (P.A. 32.) Both Mary Fister and her parents were present. Based on the evidence presented, the hearing examiner made detailed findings of fact and concluded as follows:

- That the repeated posting of the letter constituted a willful violation of a reasonable school board regulation;

- That the repeated posting of the letter in violation of school policy constituted willful conduct on the part of the student which materially and substantially disrupted the education process of others in the school.

(P.A. 34.) On July 23, 1996, Mary Fister and her parents were given notice that the School Board of MNCS had expelled her from attending school for a period of one year beginning on July 9, 1996.

E. Statement of the Proceedings.

Mary Fister's father, William Timothy Fister, who is not an attorney, initially made two applications to the federal district court in April and May 1996 seeking a temporary restraining order, restraining MNCS from suspending Mary Fister from school. The motions were denied without prejudice with leave granted to Petitioner to submit an amended motion which complies with the rules of the court. (P.A. 25.)

Thereafter, the federal district court appointed counsel to represent Mary Fister on a pro bono basis. Because the counsel appointed by the court and Petitioner had diverging viewpoints regarding how the case should proceed, counsel requested to withdraw. In response, MNCS pointed out that if counsel was allowed to withdraw from representation without a substitution of counsel, Mr. Fister, who is not an attorney, should not be permitted to act on behalf of his daughter. By order of the court, counsel was allowed to withdraw.

Mr. Fister, on behalf of his daughter Mary Fister, filed an Amended Complaint which asserted two causes of action: Count I - Freedom of Speech and Count II - Equal Protection. (R.A. 1.)

Both MNCS and Petitioner sought summary judgment. By judgment entered May 1, 1997, the district court granted MNCS's motion for summary judgment. The district court, citing this Court's decisions in Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), and Tinker v. Des Moines

Indep. Community School Dist., 393 U.S. 503 (1969), concluded that based on the undisputed facts, MNCS did not act beyond its authority in determining that Mary Fister's posting of the letter constituted harassment within the contemplation of the MNCS policy. There was no First Amendment violation by MNCS. (P.A. 20-21.)

The district court further concluded that even if this was a First Amendment protected posting, the posting was posted for a full two months before it was taken down. The federal district court concluded:

> She [Mary Fister] had a chance, therefore, to express herself to the full. And a reasonable regulation under these circumstances did not in any fashion impair her rights. And on that claim, summary judgment is therefore granted in favor of the defendant.

(P.A. 21.)

With respect to the equal protection claim, the district court concluded that Mary Fister had not presented any facts demonstrating that she was treated differently than others who were similarly situated to her. (P.A. 21.)

William Timothy Fister, on behalf of his daughter Mary Fister, appealed the matter to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit, in an unpublished per curiam opinion, affirmed. (P.A. 1.) The Eighth Circuit agreed with the district court that MNCS did not violate Mary Fister's First Amendment rights. The Eighth Circuit explained:

> MNCS did not violate Mary's First Amendment rights, because Mary posted material directed at another student and his family, and school officials had received complaints that the

> student and his brother felt harassed and were suffering an interference with their education. See Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (noting public school students cannot be punished merely for expressing their personal views on the school premises, "unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'").

(P.A. 3.) The Eighth Circuit also affirmed the dismissal of Mary Fister's equal protection claim because she had failed to offer evidence that she was treated differently from others similarly situated to her. (P.A. 4.)

REASONS FOR DENYING THE WRIT

As this Court stated in Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988), "the determination of what manner of speech in the classroom or in school assemblies is inappropriate properly rests with the school board, rather than with the federal courts." MNCS enacted policies and procedures to maintain order in its school. These policies and procedures were enforced by the school board and are entitled to deference. The record is undisputed that Mary Fister posted material directed at another student and his family, and that school officials had received complaints that the student and his brother felt harassed by her actions and were suffering interference with their education. The record stands undisputed that the posting and reposting disrupted education for the students at MNCS. A dismissal hearing was held before an independent hearing examiner who concluded that Mary Fister had willfully violated a reasonable school board regulation and had engaged in willful conduct that

materially and substantially disrupted the education process of others in the school. (P.A. 34.) Pursuant to and in accord with Minn. Stat. § 127.29, subd. 2(a) and (b), Mary Fister was expelled.

Mary Fister's case certainly does not present one of the rare instances when federal courts should "intervene in the resolution of conflicts which arise in the daily operation of the school systems." Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982), quoting Tinker, 393 U.S. at 507; see also Hazelwood, 484 U.S. at 273. The lower courts fully considered and correctly analyzed and decided the issues presented by Petitioner in accord with the decisions of this Court. The Eighth Circuit's decision is not in conflict with decisions of other circuit courts of appeals or this Court. Petitioner is, at best, voicing dissatisfaction with MNCS's school policy and the actions taken pursuant to that policy. Such dissatisfaction presents no basis for certiorari review.

Petitioner now contends that the expulsion hearing that MNCS provided was not impartial and that MNCS should have furnished Petitioner a lawyer. These assertions are not First Amendment or equal protection claims, which are the only claims asserted in Petitioner's complaint. The thrust of Petitioner's argument is not a constitutional challenge but a challenge to the school board's ultimate determination that Mary Fister be expelled. Such a challenge is not appropriate for certiorari review.

Petitioner also now asserts that Mary Fister's posting was "political in nature" and "pure speech." Fister relies on this Court's decision in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Tinker involved three public school students who peacefully demonstrated against the Vietnam War by wearing black armbands and were suspended for their conduct. This Court held that the school violated the students' First Amendment rights because (1) the

protest was akin to pure speech because its context was of a political nature and (2) the protest was handled in a peaceful manner which was neither disruptive nor invasive of other rights. Id. at 505, 508. Unlike Tinker, Mary Fister's speech was neither political nor akin to pure speech. Mary Fister was not espousing any political views via the posting of the letter. She posted the letter of a third party; the "speech" was not her own. She posted it along with a sign "Mountain out of a molehill" which was directly aimed at another student and his parents. It should be noted that when Mary Fister posted her own complaints about MNCS's treatment of her, these postings were never removed. Mary Fister's postings, unlike the actions of the students in Tinker, were disruptive and interfered with the rights of other students to be secure and to be let alone.

Finally, as the Eighth Circuit concluded, there is no basis for Mary Fister's limited-public-forum argument. (P.A. 4.) MNCS did not hold the school premises nor Mary Fister's work space out as a public forum. (Id.) MNCS had a practice of removing or asking students to remove postings critical of others or harassing to others. Mary herself could not recall students ever posting anything offensive or anything directed at anyone else in school. Petitioner's argument has no basis in the facts.

CONCLUSION

Wherefore, Respondent Minnesota New Country School respectfully requests that certiorari be denied.

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

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Attorneys for Respondent

Dated: October 8, 1998

APPENDIX

Fister's Amended Complaint dated November 1, 1996 ..... A-1

April 17, 1996 "To Whom It May Concern" letter from Mr. and Mrs. Tomas Fish..... A-6

April 17, 1996 letter to Tim, Barb and Mary Fister from Dean Lind re: insubordination A-7

April 25, 1996 letter to Tim, Barb and Mary Fister from Dean Lind re: Mary put on five day suspension A-8

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Affidavit of Sandra Fish dated February 27, 1997..... A-12

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United States District Court
District of Minnesota
Fourth Division

William Timothy Fister
guardian and parent on behalf
of Mary Fister

Civil Action No. 4-96-339

Plaintiff

-vs-

AMENDED COMPLAINT

Minnesota New Country School

Defendant

I.
Jurisdictional Statement

1. This action arises under the United States Constitution, specifically the First Amendment and Fourteenth Amendments to the U.S. Constitution. Accordingly, this court has original jurisdiction of this action under 28 U.S.C. § 1331.

II.
The Parties

2. Mary Fister is twelve years old, and is a resident of St. Peter Minnesota.

3. Defendant Minnesota New Country School (hereinafter "MNCS") is a charter public school, Minnesota Independent School District No. 4007 operating in LeSueur Minnesota.

III.

Factual Background

4. Mary Fister was a student at the Minnesota New Country School (MNCS) in LeSueur Minnesota during the 1995-1996 academic school year.

5. The MNCS is and was a public school, which had a written policy for the 1995-1996 academic school year that permitted the students to publicly display things in their personal work area. This policy designated a limited public forum.

6. Mary Fister was suspended and expelled from the MNCS during the 1995-1996 academic school year for posting in her personal work area a thing which of and in its own content was not objectionable per the school's written policy on displaying things.

IV.

Causes of Action

Count I.

Freedom of Speech

7. Plaintiff incorporates by reference herein the allegations contained in paragraphs 1-6 and does further allege as follows:

8. The defendants' actions referred to herein were committed under color of state law, and pursuant to the policies, customs or practices of the MNCS.

9. The effect of the defendants' actions as stated herein has been to deprive the Plaintiff of her right of free speech under the law as guaranteed by the First Amendment to the United States Constitution rendering the defendants liable to the Plaintiff under 42 U.S.C. § 1983.

10. As a direct and proximate result of the defendants' actions the Plaintiff has suffered, and will continue to suffer, irreparable harm in the deprivation of her fundamental constitutional rights of free speech under the law, as well as injury to her academic standing from the suspensions and expulsion brought to bear against Mary by the MNCS.

Count II.
Equal Protection

11. Plaintiff incorporates by reference here the allegations contained in paragraphs 1-10 as fully as thought set forth verbatim herein.

12. The effect of the defendants' actions as stated herein has been to deprive the plaintiff of her right of free speech, and equal protection under the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution rendering the defendants liable under 42 U.S.C. § 1983.

13. As a direct and proximate result of the defendants' actions the Plaintiff has suffered, and will continue to suffer, irreparable harm in the deprivation of her fundamental

constitutional rights of free speech and equal protection under the law, as well as injury to her academic setting from the suspensions and expulsion brought to bear against Mary by the MNCS.

V.

Requests for Relief

14. We request the Court to give the defendant, the Minnesota New Country School, instruction to immediately lift the expulsion of Mary Fister from the MNCS and to take sufficient action to immediately rescind the vote of the MNCS School Board and the offensive stain they placed on Mary Fister's public school record in their expulsion of Mary Fister from the MNCS.

15. We request the Court to award compensatory damages against the defendants, the Minnesota New Country School, in an amount in excess of $50,000.00, together with the costs of this cause and a reasonable attorney's fee as provided in 42 U.S.C. § 1988.

Dated: 11/1/1996

/s/ William Timothy Fister

William Timothy Fister
314 South Third St.
St. Peter, MN 56082
(507) 931-4083

I, Mary Fister, do hereby affirm under penalty of perjury that the statements contained in the foregoing Complaint are true and correct to the best of my information, knowledge and belief.

/s/ Mary Fister

Dated: 11/1/96

April 17, 1996

To Whom It May Concern:

Our son, Jeffrey, has requested to move out of Thomas Hall due to continued harassment from Mary Fister. Ms. Fister continues to post a letter she has repeatedly been asked to take down and her advisor has failed to impose any restrictions or discipline an Mary. While Kim Borwege has been an excellent advisor and a good match for the advisor/advisee relationship the situation created by Mary Fister and Dean Lind's tolerance of Mary's actions necessitates this move.

Sincerely,

/s/ Mrs. Tomas Fish

Mr. and Mrs. Tomas Fish

April 17, 1996

To: Tim, Barb an Mary Fister

From: Dean Lind (advisor at MNCS)

Subject: Insubordination

In letters to you from the Anderson Law office and myself, and by my verbal direction to you at a parent, advisor, student conference attended by myself and you (Mary, Tim and Barb Fister), and by verbal direction by me to Mary, Mary has been asked several times that a letter directed to her by Tom and Sandy Fish should not be displayed in the school since it serves no educational purpose and it is perceived as harassment by the Fish family. Mary continues to post the letter in her work area.

If the letter is put up one more time, I have no choice but to suspend Mary for a period of 3 days. She will not be allowed to return to school until there is a conference with Mary, her parent or parents, MNCS legal council and her advisor.

Sincerely,

Dean Lind

April 25, 1996

To: Tim, Barb an Mary Fister

From: Dean Lind (advisor at MNCS)

Subject: Mary put on five (5) day suspension

You are here by given notice that at this time Mary is being put on a five (5) day suspension.

The grounds for the suspension concern #14 of the MNCS Discipline Policy referring to, "endanger the safety, health, or well being of other students or school personnel" and section 127.29, Subdivision 2 a, and b of Minnesota's Pupil Fair Dismissal Act which concerns students, "Willful violation of any reasonable school board regulation," and "Willful conduct which materially and substantially disrupts the rights of others to an education." The posting of the letter is beginning to be disruptive to the entire school and must stop. After being specifically directed to not again post a letter from the Fish family to Mary because posting the letter causes distress to the Fish boys and results in "disrupting the rights of others to an education," Mary put the letter back up in her work area.

Since this is the second such offense, Mary will be suspended beginning today, April 25 and continue through May 1. Mary will be allowed to return to school at 8:30 AM on May 2, provided there is a conference with Mary, her parent or parents, Dean Lind advisor and MNCS legal council.

1f there are any questions, please atty. Art Anderson at 507-665-3349.

Sincerely,
/s/
Dean Lind

April 25, 1996

To: Tim, Barb an Mary Fister

From: Dean Lind (advisor at MNCS)

Subject: Mary's return to MNCS

Mary is scheduled to return to MNCS Thursday May 2, following a five day suspension for failing to following the directions of MNCS staff. The conference for Mary returning to MNCS will be held Wednesday, May 1 at 3:00 P.M. in MNCS Thomas Hall.

If Mary continues to insist on posting the letter from the Fish's when she returns to school, she will be put on an immediate five (5) day suspension at which time MNCS will begin expulsion proceedings. If more time is needed to arrange for a hearing officer to arrange an expulsion hearing, the suspension could be extended an extra five days.

I would like to point out the seriousness of this action. Expulsion can extend for a period of up to one half the following school year and is reported to the state board of education. It is a serious issue to be included in a student's file, not to mention the interruption in the student's education. It is the desire of MNCS to see all students successfully complete their education in school in a timely manner if they wish to. To insure that occurs, we need to maintain discipline and order to protect the rights of all students who attend MNCS.

Sincerely,
/s/
Dean Lind

June 5, 1996

To: Tim, Barb and Mary Fister

From: Dean Lind (advisor at MNCS)

Subject: Mary Fister expulsion

Mary has in the past been informed she would be suspended for five (5) days pending expulsion if she again posted the letter from the Fishs. She has been asked not to post the letter several times. This morning she reposted the letter.

As of this time Mary is suspended pending expulsion proceedings. You will be informed in the next five days of our continuing actions in this matter.

Sincerely,

/s/
Dean Lind

June 14, 1996

Tim, Barbara and Mary Fister
314 So. 3rd St.
St. Peter, MN 56082

Dear Mr. and Mrs. Fister and Mary,

The suspension for Mary is being extended for a period of ten days. We are in the process of arranging the hearing for possible expulsion. I will be gone with a group of school students on a trip to Washington D.C. next week so we are planning the hearing the following week. You will receive notice of the hearing shortly.

The dates for the extension relate to the no student day on June 7 and the week of vacation on June 10 to June 14.

Alternative education is not pertinant during summer education at MNCS.

Sincerely,

/s/
Dean Lind

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

William T. Fister, as guardian and parent on behalf of Mary Fister,

Court File No. 4-96-339

Plaintiff,

v.

AFFIDAVIT OF SANDRA FISH

Minnesota New Country School,

Defendant.

STATE OF MINNESOTA)
) SS.
COUNTY OF NICOLLET)

Sandra Fish, being first duly sworn upon oath, deposes and states as follows:

1. My husband Tom and I have two sons, Scott (the eldest) and Jeff, who were students at Minnesota New Country School (MNCS) for the 1995/96 school year. During that year, Jeff was in the 8th grade.

2. At the beginning of the school year, another student at MNCS, Mary Fister, began a pattern of persistent gathering of information from Jeff regarding the Ney Pond deformed frogs. The frogs were being studied by students in the school and was gaining state-wide recognition. She persistently sought information from Jeff. In the face of Jeff's repeated refusal, Mary Fister continued to pester Jeff and even demanded in what the teacher described as a forceful and rude manner that he fill out a questionnaire on the topic. My son

Jeff did not fill out the questionnaire and reported to me that he again told Mary Fister to leave him alone, but she did not listen to him. Mary Fister called Jeff at home and continued to harass him for the information. Finally, Jeff gave in and provided the information out of intimidation.

3. I observed Mary Fister's behaviors were intensely disturbing to my son and as a result his education was disrupted. In an effort to end the disruptive behavior, my husband and I wrote the following letter to Mary Fister, dated October 7, 1995:

> It has come to our attention you have been soliciting information and quotes from our son, Jeff, regarding the frogs, his feelings about the frogs, and the research surrounding them. As Jeff's parents, we do not want you using information or quotes given to you by our son for publication.

A copy of this letter is attached as Exhibit A.

4. Following our sending the above letter to Mary Fister, I was invited to a meeting at the school. The meeting was set, at least in part, to address the issue of my son being coerced to provide information for an article Mary Fister was writing about the deformed frogs and using my son's name in her publication. The meeting included the following individuals and took place right after school hours on 10/11/95: MNCS advisor/teacher John Brosnan; myself; MNCS advisor/teacher Cindy Reinitz; Mr. Fister, Mrs. Fister and Mary Fister.

It was impossible to resolve any of the issues because Mr. Fister allowed very little opportunity to speak in the meeting. In addition, Mr. Fister was relentlessly rude, verbally abusive and screamed at others throughout the meeting. In the meeting, Mr. Fister's behaviors were physically intimidating to me.

Before the meeting, which was right after school hours, my son Jeff was working on the computer in the school. Mr. Fister came into the room where Jeff was and silently paced back and forth behind where my son was seated which was intimidating to Jeff. After the meeting, my son was terrified because he had overheard the meeting and Mr. Fister's shouting and intimidation.

The following day, 10/12/95, I wrote a letter to the school explaining all of this and that I found it intolerable that any staff member or student should have to be subjected to the abusive attacks of Mr. Fister and to the manipulative schemes of his daughter, Mary Fister.

5. Soon after this meeting, in the fall of 1995, I observed a posting at Mary Fister's work area. This posting consisted of a copy of my husband's and my letter of 10/7/95 to Mary Fister. Along with this, and slightly overlapping the letter, was a sign which read, "Making a mountain out of a molehill" and with an arrow pointing from it to our letter to Mary Fister. As I was often in the MNCS building picking up my sons, I was with my son Jeff when we first noticed the letter. I felt the obvious intent of this posting was to make a statement that was both disrespectful and degrading to our family.

6. From November of 1995 through at least April of 1996, I verbally complained numerous times to MNCS staff about the letter being posted. To my knowledge, during this time no disciplinary action was taken with Mary Fister to abate this harassment of my sons. Even though the posting was being removed by MNCS staff and others, Mary Fister simply reposted other photocopies of our 10/7/95 letter to her.

7. Mary Fister's harassment of my sons by posting this letter was very disturbing to my sons and directly interfered with their education, making it difficult for them to do their school work.

8. Due to this continued harassment, on 4/3/96 I formally complained in writing to MNCS advisor Dean Lind. (See attached Exhibit B, my 4/3/96 letter to Mr. Lind.) I felt that the harassment by Mary Fister had become intolerable. It had been so stressful for my son, Jeff, that he had formally requested to be moved away from Mary Fister to another building. (See attached "To Whom It May Concern" letter of 4/17/96, Exhibit C.)

9. During this time frame I made it clear to MNCS staff that if they were unable to abate the harassment of my sons in the school by Mary Fister's posting of the letter, I would have to consider taking action with a higher authority outside of the school.

10. Mary Fister, through her action of posting my 10/7/95 letter to her along with her sign "Making a mountain out of a molehill," and her continued posting of copies of this letter throughout the school year created a material and substantial disruption of my sons Jeff's and Scott's education at MNCS in the 1995/96 school year. Jeff's grades at MNCS were "incomplete in all sections," according to transcript. In other words, the transcript reflects no work was completed. Previously, Jeff had always been a good student and in the current year he has received "A's" and "B's" at another school.

I also noticed that my son was so disturbed that he experienced a period of time of decreased sleep beginning around the time of Mr. Fister's confrontational meeting with us of 10/11/95 and continuing for a period of approximately two months in the period of time Mary was posting our letter in the school. In addition, throughout the school year, Jeff expressed to me his feeling that Mary Fister was making fun of him by posting the letter, that he was very uneasy to be around her and was frequently very angry, all as a result of Mary's behavior, including the posting of the letter.

11. As a result of Mary Fister posting our 10/7/95 letter to her in the school, my son Scott's education at MNCS also

was substantially disrupted. Ordinarily very good natured, during the period time of Mary Fister's harassment, Scott became very closed, spending more time in his room. I also feel Scott suffered from depression during this period of time and, although ordinarily a straight A student both before and after this time at MNCS, he simply stopped doing his work at MNCS.

12. I also observed, although to a limited degree, how Mary Fister's posting of the letter was disruptive to the education of other students at MNCS. In one instance, I observed a few students were evidently so upset by Mary Fister's harassment of Scott and Jeff, by repeatedly posting the subject letter, that they were discussing inappropriate ways of expressing their feelings about the situation. Being a school employee with another school district, I had to intervene.

13. On 4/24/96, right after Mary Fister posted yet another copy of our letter to her, even when warned not to, MNCS advisor Dean Lind indicated to Jeff and Scott that they should not come to school the next day, 4/25/96. The implication from Mr. Lind was that something was going to happen that day which would precipitate a confrontation with Mr. Fister. I brought my sons, Jeff and Scott, to school on that day as I felt they had a right to their education. When we arrived in the morning that day, the letter was once again posted and Mr. Lind was typing up a discipline notice to Mary Fister. Mr. Fister soon arrived and, in the room where I was sitting, he began pacing up and down behind me with his arms folded. This situation directly deprived my sons of their right to an education at MNCS as they were not only advised by Mr. Lind to stay home, but also were afraid to be at the school.

14. Given Mr. Fister's behaviors, as well as Mary Fister's persistent harassment of my sons at MNCS through the persistent posting of our letter, I felt that MNCS was not a safe environment for my sons and they were deprived of their

right to an education. This influenced my decision in enrolling my sons at a different school for the following school year where they both have been academically successful.

FURTHER YOUR AFFIANT SAITH NOT.

DATED: 2-27-97, 1997.

/s/
Sandra Fish

Subscribed and sworn to before me
this 27 day of Feb., 1997.

/s/ Marcus A. Lloyd
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

William T. Fister, as guardian and parent on behalf of Mary Fister,

Plaintiff,

v.

Minnesota New Country School,

Defendant.

Court File No. 4-96-339

AFFIDAVIT OF KIM BORWEGE

STATE OF MINNESOTA)
) SS.
COUNTY OF _____)

Kim Borwege, being first duly sworn upon oath, deposes and states as follows:

1. I am an advisor (teacher) for the Minnesota New Country School, the Defendant in this matter.

2. For a history of this matter, including Mary Fister's actions and related disciplinary proceedings at MNCS, refer to the Affidavit of Mary Fister's advisor/teacher at MNCS and my fellow staff member, Dean Lind. I was involved in some of the conferences with Mary Fister and Dean Lind regarding her posting of some of the copies of her letter from Mr. and Mrs. Fish.

3. MNCS staff, including myself, often take down things of an inappropriate or disruptive nature that are posted by students.

4. I observed that Mary Fister's act of posting the Fish letter was extremely disruptive to the education process of a number of students at the school. Many of the students were upset that Mary Fister's actions were continuing and, rather than focusing on their school work, they were focusing on the conflict that the posting of this letter engendered.

Many of the students were disturbed and felt it unfair that Mary Fister was doing this and some of the students took it upon themselves to take down Mary Fister's posting of the subject letter themselves.

Also, there was a disruption in discipline in the school because many students were upset because they did not understand why Mary Fister was somehow getting away with an inappropriate posting when she was not supposed to.

Many students were disturbed that Mary Fister seemed to be ignoring a directive to take down something that was ostensibly aimed at being disrespectful towards and harassing of another student; in other words, they were saying words to the affect, "Why does Mary think she does not have to follow directions from Advisor/Teachers?" I recall specifically that student Scott Fish told me that he was disturbed by Mary Fister's posting of the subject letter.

5. MNCS is a very small school. There is no separate administration. The limited staff have to handle administrative tasks in addition to their teaching duties. MNCS's time was taken up by dealing with Mary Fister's posting issue with conferences, suspension hearings and the like. As such, this took time directly away from the teachers' time ordinarily spent educating students in the school. Some students went so far as to tell me that dealing with this issue was taking up teachers' time that should be spent with them.

FURTHER YOUR AFFIANT SAITH NOT.

DATED: 2/28/97, 1997.

/s/
Kim Borwege

Subscribed and sworn to before me
this 28th day of February, 1997.

/s/ Kathryn M. Holicky
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

William T. Fister, as guardian and parent on behalf of Mary Fister,

Court File No. 4-96-339

Plaintiff,

v.

AFFIDAVIT OF NANCY MILLER

Minnesota New Country School,

Defendant.

STATE OF MINNESOTA)
) SS.
COUNTY OF _____)

Nancy Miller, being first duly sworn upon oath, deposes and states as follows:

1. I am a Teacher/Advisor at Defendant Minnesota New Country School, and functioned in this capacity during the 1995/96 school year.

2. I was Jeff Fish's Advisor/Teacher for approximately two months in the fall of 1995. Although I was never Mary Fister's Advisor/Teacher, I provided transportation for both Jeff and Mary to and from the school and home in the school's van, along with several other students. In this fashion, I provided transportation to Mary Fister almost all of the time, whereas with Jeff, I provided transportation off and on. This is the only time I would have any substantive contact with Jeff Fish or Mary Fister together.

3. At some point in the fall of 1995, I recall Mary Fister asking Jeff Fish for information regarding the "frog project." I recall that Mary Fister asked him for this information a couple of different times and was quite persistent about obtaining information from Jeff. Although I do not recall Jeff refusing to provide information, he was evasive about providing information and it was clear Mary Fister's persistence was making him very uncomfortable.

4. As the school year progressed, there was obviously some tension between these two students. On my transportation route home, I picked up Jeff prior to picking up Mary. Although Jeff is ordinarily a very outgoing, upbeat and interactive personality, when we would pick up Mary, Jeff would become quiet and was extremely uncomfortable around Mary Fister. Although Jeff continued to interact in his usual upbeat personality with other students, his closed and uncomfortable behavior with Mary Fister was markedly unusual to my observance. As tensions grew, they simply avoided each other.

FURTHER YOUR AFFIANT SAITH NOT.

DATED: February 28, 1997.

/s/
Nancy Miller

Subscribed and sworn to before me
this 28th day of February, 1997.

/s/ Kathryn M. Holicky
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT COURT OF MINNESOTA

William T. Fister, as guardian and parent on behalf of Mary Fister,

Plaintiff,

v.

AFFIDAVIT OF CINDY REINITZ

Minnesota New Country School,

Defendant.

STATE OF MINNESOTA)
(SS.
COUNTY OF LE SUEUR)

Cindy Reinitz, being first duly sworn upon oath, deposes and states as follows:

1. I was an advisor/teacher employed at Defendant Minnesota New Country School ("MNCS") from July 1, 1995 to June 30, 1996.
2. Although I was in a different building from Mary Fister throughout almost the entire school year, I did observe posted at Mary Fister's work station the 10/7/95 letter to her from Mr. and Mrs. Fish along with a sign which I assumed was made by Mary Fister stating "making a mountain out of a molehill" with an arrow pointing to the Fish letter. I observed that the subject letter was posted continually from some time in late October or early November of 1995 through May of 1996. Each time the letter was

taken down, Mary Fister simply posted another copy of the letter. I was, however, not directly involved in the disciplinary actions related to Mary Fister and the posting of the subject letter.

3. It was my observation that Mary Fister's posting of the subject letter, including the continual and repetitive posting of it, constituted a material and substantial disruption of the education process at Defendant Minnesota New Country School. I observed it to be particularly disruptive and distressing for one student in my building, Jeff Fish, although it was disruptive for many other students as well. Below are some examples:

    a. Student Jeff Fish was in my building for part of the 1995/96 school year. In fact, at one point in time he and his parents request that he be moved out of Thomas Hall, where Mary Fister was, and into Frog Hall, where I was, because Jeff indicated that he was very disturbed by Mary Fister's posting of the subject letter. Jeff, like all students in my building, would go to Thomas Hall daily to pick up mail, consult with other advisors, work on projects, or visit their friends. This often occurred during lunch.

    After Mary Fister had been instructed to take down the subject letter, every time Jeff observed it to be re-posted, I would observe him entering Frog Hall appearing to be very distraught and exclaiming to me, his advisor, "The letter is up again!" This often occurred at lunch time. I would observe Jeff in reaction to seeing the letter re-posted

as being extremely agitated and emotionally distraught. At least twice he was so upset he asked to call his mother at work, which he did.

Whenever he observed the letter re-posted, Jeff was too upset to continue to work on his curriculum for the remainder of the day, often from the noon hour on. This happened a number of times and was completely disruptive of Jeff's education.

b. During the numerous times that Jeff Fish was upset and agitated at the posting of the subject letter, I had to take my focus off the education of other students for whom I was responsible to take the time to help Jeff calm down and deal with his emotions.

c. As there are no administrators in the school, advisor/teachers take on this role. When advisor/teachers are dealing with discipline issues, this directly takes them away from time spent in instruction of students. In addition, Mary Fister's act of posting the subject letter was disruptive to the educational process as discipline, respect and order in the school eroded when Mary Fister continually acted contrary to instructions. As a result, other students objected to disciplinary actions asking why they should be disciplined when Mary Fister did not have to do what advisors instructed.

4. As a teacher, I use school policy in determining what a student can post or use for decoration in school. In particular, I do not allow a student to distribute or post anything which is perceived as harassment by another student or students. I have confiscated such items from students before and have removed things that were posted of an inappropriate nature in the schools in which I have taught. (For example, one of my second grade students recently wrote a note saying something unkind about a peer. That peer was upset by the note and the author of the note was disciplined according to school policy. It is considered "verbal abuse" in my current school policy.) I have never encountered a situation such as with Mary Fister where a student continued to post disruptive items even after having been repeatedly instructed not to.

5. In August of 1995, I was assigned to be Mary Fister's advisor/teacher although, as it would turn out, this was a role I would never fulfill. I had seen the Fisters at school prior to this but had very little reason or opportunity to interact with them. My only interaction with Mary had been brief self directed learning activity which I had facilitated. At an August meeting for students and parents I introduced myself to Mr. and Mrs. Fister and Mary as Mary's advisor and asked to arrange a standard preschool conference with the family. Mr. Fister informed me that I would not be his daughter's advisor, that he was an "anarchist" and that he would choose his own daughter's advisor.

   On October 9, 1995 my colleague John Brosnan, Mary Fister's advisor, informed me that Mr. Fister had phoned him inquiring how to file a complaint against me. Mr. Fister would not reveal the nature of

the Complaint. In response, John Brosnan arranged a meeting with the Fisters as a first step in an attempting to resolve Mr. Fister's complaint.

During this meeting on October 12, 1995, which Mr. Fister tape recorded, Mr. Fister continually interrupted others when they attempted to speak. He shouted loudly enough to be heard by people in other parts of the building. In addition, he engaged in both verbal and physical intimidating behaviors, which included walking back and forth behind my chair with his arms crossed while asking me questions. He would then interrupt me as I attempted to answer his questions. Mr. Fister made false accusations and disparaging comments to me. I left the meeting when I refused to continue listening to what I perceived as disrespectful behavior towards me. John Brosnan documented and later told me that Mr. Fister made a comment about me and made a lewd gesture at me (gave me "the finger") as I left the meeting in the presence of Barbara Fister and Mary Fister.

Since that time, Mr. and Mrs. Fister have made a false and baseless complaint against me to the MNCS School Board and the Minnesota Board of Teaching. That complaint was found by both organizations to be without cause.

FURTHER YOUR AFFIANT SAITH NOT.

DATED: March 3, 1997

/s/
Cindy Reinitz

Subscribed and sworn to before me
this 3rd day of March, 1997.

/s/ Arthur E. Anderson
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

William T. Fister, as guardian and parent on behalf of Mary Fister,

Court File No. 4-96-339

Plaintiff,

v.

AFFIDAVIT OF DEAN LIND

Minnesota New Country School,

Defendant.

STATE OF MINNESOTA)
) SS.
COUNTY OF LE SUEUER)

Dean Lind, being first duly sworn upon oath, deposes and states as follows:

1. I am an advisor (teacher) for the Minnesota New Country School ("MNCS"), the Defendant in this matter. I was Mary Fister's Advisor for much of the 1995/96 school year.

2. MNCS is a relatively small school serving approximately 85 to 90 middle and secondary students. MNCS is a "charter school" sponsored by the LeSueur/Henderson Board of Education. Its creation as a secondary charter school was granted by the Minnesota State Board of Education in 1994. As a charter school, MNCS represents a paradigm shift in education where the model of

learning is no longer that of students as empty vessels to be filled with knowledge by their teachers. (Refer to the attached Exhibit 1 "Minnesota New Country School" brochure.) As referenced in MNCS's brochure, the students take on direct, personal responsibility for their education rather than relying entirely on a teacher as the deliverer of instructional services. The school stresses, "values of high expectations (devoid of threats); of trust (until abuse); and of decency (values of fairness, generosity and tolerance)." Not only is there extensive student to student interaction but also teacher/student accountability is stressed. The students are ultimately responsible for attaining higher standards than traditional public schools, including higher standards of interpersonal tolerance, decency and fairness as stated above.

3. Sometime during the fall or early winter of 1995 Mary Fister posted in her work area a letter she had received from the parents of two fellow students, brothers Scott and Jeff Fish. Mr. and Mrs. Fish's letter, dated 10/7/95, was in reaction to Mr. and Mrs. Fish's and their son Jeff's perception that Mary Fister was persistently and coercively trying to obtain information from Jeff Fish regarding the Ney Pond deformed frogs which had gained attention in the media. The 10/7/95 letter from Mr. and Mrs. Fish to Mary was brief and reads as follows:

> It has come to our attention you have been soliciting information and quotes from our son, Jeff, regarding the frogs, his feelings about the frogs, and the research surrounding them. As Jeff's parents, we do not want you using information or quotes given to you by our son for publication.

4. When Mary Fister first posted a copy of Mr. and Mrs. Fish's letter, right next to it and with an arrow pointing from it to the letter was a sign which read "Making a

mountain out of a molehill." I was informed by Jeff and Scott Fish, as well as Mr. and Mrs. Fish, that they felt Plaintiff Mary Fister's posting of this letter constituted harassment. They also told me it was disturbing to them and interfering with the Fish boys' ability to receive an education. I informed Mary Fister of this and told her to remove the posting. When she did not, it was taken down by MNCS staff members, including myself, Nancy Miller and Kim Borwege. There may have been others. Whenever the posted letter was removed, Mary Fister immediately would insubordinately re-post another copy of the letter.

5. On February 14, 1996, at a parent/advisor/student conference, I informed Mr. and Mrs. Fister and Mary Fister that the letter Mary Fister was posting in the work area was perceived as harassment by fellow student Jeff Fish. I also told them this act interfered with Jeff Fish's education and was in violation of MNCS's discipline policy and the Fair Pupil Dismissal Act of 1974. I instructed Mary Fister not to display the letter in the future. Contrary to this instruction, I observed that Mary Fister continued to re-post the letter numerous times, immediately after it was taken down. Throughout this time frame, MNCS staff, including myself, were repeatedly informed by the Fishes that the continued posting of the letter was perceived by them as harassment and that it was disruptive to their education. It was also disruptive of the education process of other students in the school.

6. Mary Fister continued posting the subject letter with the full knowledge that the result would be further disciplinary action, including suspension and expulsion. Ultimately, this led to three suspensions, all of which I oversaw and administered: three days beginning on 4/19/96, five days on 4/25/96, and five days on 6/5/96. Each time I informed her that a condition of her return to school was that the subject letter not be posted. Yet, she ultimately posted the letter again upon her return. Mary Fister was expelled after a

hearing on 6/28/96 pursuant to Minnesota's Fair Pupil Dismissal Act of 1974.

7. Attached as Exhibit 2 is, "MNCS Discipline Policy and Operating Procedures, Daily Operating Procedures, 1995-96." Paragraphs 12 and 14 read as follows:

> 12. **Displays:** Students may decorate their individual work space but all pictures must be placed on bulletins boards, not taped to the wall. However, students may not have pictures/phrases of an inappropriate sexual nature, profanity, drug, tobacco or alcohol displayed in the school. Refusal to comply with this rule may result in suspension;
>
> 14. **Health and Safety:** Students may in no way endanger the safety, health, or well being of other students or school personnel. Fighting, threatening language, or other endangerment or harassment will be grounds for suspension and/or expulsion.

8. The student areas are not a public forum for expression; however, students are allowed to decorate these areas. Regardless of the term "personal work area," these are common areas readily observed by others in the building. Any decoration or postings of an inappropriate nature have always been taken down at the discretion of staff.

9. When I have observed student work areas in the school with postings that were inappropriate, critical of or aimed in a negative way at another, I have directed the student to remove the material. The student then removed the posting as directed. In fact, other students posted materials critical of Mary Fister and I directed that these items be removed. Again, the students did as asked and removed the items.

10. Mary Fister's posting of the subject letter, including the continual and repetitive posting of it throughout the school year, constituted a material and substantial disruption of the education process and right to an education of MNCS students in general and specifically of the Fish boys.

a. As previously mentioned, the posting of the subject letter, and its continued and repeated posting, was reported to me as being experienced as harassment by students Jeff and Scott Fish. For Jeff Fish in particular, the focus on the harassment aspect of the posting of the letter was distracting and emotionally upsetting for him, ultimately leading to his request in April of 1996 to be removed from the building Mary Fister was in due to Mary Fister's actions.

b. Mary Fister's posting of the letter materially disrupted the education of other students. The posting of the subject letter was a considerable focus for other students in the school who were not only disturbed that an individual student was being harassed, but also were distracted by the disciplinary implications. Mary Fister's insistence on posting near her desk the letter from the Fish family was noted by other students, was resented and caused a break down of respect, discipline and order. This materially disrupted class work as it took the students' minds off their class work and focused them on a conflict situation.

c. As there are no administrators as such at MNCS, the Advisors/teachers handle all administrative tasks. Any time an advisor's attention is taken

away from teaching to deal with discipline issues, there is a direct and broad disruption of the education received by all of the students assigned to that particular advisor. As a substantial amount of my time was devoted to dealing with this issue, it took directly away from my providing an education to the students of whom I was in charge.

11. During the 1995/96 academic year, Mrs. Fish indicated to me that if Mary Fister's posting of the letter continued unabated, the Fishes would have to consider legal action against MNCS.

12. During the 1995/96 school year, I met with Mary Fister and her parents numerous times regarding the disruption caused by the posting of the subject letter, and met with them through the suspension and expulsion process. Due to the words, behaviors and actions of Mary Fister's father, Tim Fister, I found it impossible to accomplish anything constructive to deal with the issue of the posting of the subject letter by Mary Fister. I and others, including MNCS staff, were subjected to Mr. Fister's verbal and physical behavior of a threatening and intimidating nature, including screaming and yelling and threats.

13. As we expect more of all students, we expected more of Mary Fister as an MNCS student. Indeed, Ms. Fister violated the school's mission and guiding principles by carrying on a campaign she knew was extremely disruptive of the education of others in the school. Moreover, her acts were an intentional invasion of the rights of other students.

14. I attach the following exhibits which explain a disciplinary process with Mary Fister regarding her disruptive acts. With the exception of Exhibit 2, which I received from the Fishes, I prepared all of these documents. They are as follows:

Exhibit 3 - 4/17/96 "To Whom It May Concern" letter from Mr. and Mrs. Tomas Fish

Exhibit 4 - 4/17/96 letter to Tim, Barb and Mary Fister from Dean Lind, subject: insubordination

Exhibit 5 - 4/18/96 MNCS Notification of Suspension of Mary Fister

Exhibit 6 - 4/25/96 letter to Tim, Barb and Mary Fister from Dean Lind, subject: Mary put on five (5) day suspension

Exhibit 7 - 4/25/96 letter to Tim, Barb and Mary Fister from Dean Lind, subject: Mary's return to MNCS

Exhibit 8 - 6/4/96 Notification of Suspension pending expulsion to Tim, Barb and Mary Fister

Exhibit 9 - 6/5/96 letter to Tim, Barb and Mary Fister from Dean Lind, subject: Mary Fister expulsion

Exhibit 10 - 6/14/96 letter to Tim, Barbara and Mary Fister from Dean Lind with attached "Notification of Suspension" extending suspension during the process of arranging a hearing for possible expulsion

Exhibit 11 - 4/19/96 "Affidavit in Opposition to Motion" (Affidavit of Dean Lind)

FURTHER YOUR AFFIANT SAITH NOT.

DATED: February 28, 1997.

/s/
Dean Lind

Subscribed and sworn to before me
this 28th day of February, 1997.

/s/ Kathryn M. Holicky
Notary Public